Supreme Court, U.S.
FILED
07-121 JUL 27 2007
OFFICE OF THE CLERK

No.

In The
Supreme Court of the United States

LESLIE VALERIE MATLAW
(*d/b/a* LESLIE V. MATLAW, P.C.),
Petitioner,

versus

U.S. MAGISTRATE JUDGE JEFFREY COLE
(NORTHERN DISTRICT OF ILLINOIS),
Respondent.

Appendix

LESLIE V. MATLAW, P.C.
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Tenth Floor, #M-995
Chicago, IL 60604-2263
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Counsel for Petitioner

**N.b.*, Petitioner proceeds herein *pro se*; presently, she seeks both admission to this Court's Bar and already-admitted Counsel
Counsel of Record

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APPENDIX A:

Seymour v. Hug, 485 F.3d 926 (7th Cir. 2007).

United States Court of Appeals
for the Seventh Circuit

DONNA L. SEYMOUR,

Plaintiff,

v.

CAROL HUG *et al.*,

Defendants-Appellees.

APPEAL OF:

LESLIE V. MATLAW

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 04 C 2041, Jeffrey Cole, *Magistrate Judge*.

ARGUED FEBRUARY 20, 2007 -
DECIDED MAY 3, 2007.

Before MANION, KANNE and WOOD, *Circuit Judges*.

KANNE, *Circuit Judge*. Attorney Leslie V. Matlaw represented plaintiff Donna Seymour in this case. Ms. Matlaw, acting on her own behalf, seeks to set aside the settlement agreement reached in this case and related orders entered in the district court. Ms. Matlaw lacks standing to bring this appeal and therefore the appeal is dismissed.

I. HISTORY

Plaintiff Donna L. Seymour filed a lawsuit in March 2004 alleging that she had been discriminated against on the basis of race in violation of the Fair Housing Act when she tried to purchase a home in suburban Chicago. The defendants are the real estate agents, potential sellers, and others associated with the contested transaction. The case was initially assigned to District Judge George M. Marovich. In August, 2004, the parties consented, pursuant to 28 U.S.C. §635(c), to proceed before Magistrate Judge Ian Levin. Judge Levin retired from the bench and the Executive Committee of the Northern District of Illinois reassigned the case to Magistrate Judge Jeffrey Cole in May 2005.

In June, 2005, the parties reported to Judge Cole that they had reached a settlement and were in the process of finalizing the settlement document. Judge Cole dismissed the case with leave to reinstate within sixty days and retained jurisdiction to enforce the settlement agreement. In July, 2005, the parties returned to Judge Cole filing cross motions to enforce the settlement agreement.

In a thirty-seven page opinion issued in November 2005, Judge Cole granted the defendant's motion to enforce the agreement and denied the plaintiff's cross motion. He concluded that the plaintiff and her attorneys had been less than honest during the settlement proceeding. Judge Cole stated that the parties' intent during the June 2005 settlement was to reach an agreement that covered both the plaintiff's claims and her minor children's potential claims against the defendants. Although the children were not parties to the case, the plaintiff referenced alleged harm to her children in her complaint and during discovery. As such, the defendants wanted, and Judge

Cole concluded the plaintiff had agreed to a global settlement covering both the mother's actual claims and any potential claims by the children. To account for the children's claims, the settlement required an allocation of the total settlement amount between the plaintiff and her children.

The plaintiff and the children are residents of the State of New York. Under New York law, the plaintiff does not have authority to settle her children's claims. Instead, a Petition must be brought before the New York Surrogate Court which makes an independent evaluation of the children's claims to insure that the children's interests have been fairly represented. Consequently, the settlement agreement required the plaintiff to petition to the Surrogate Court and obtain approval as a condition of settlement. The settlement agreement also required the plaintiff to bear the costs of petitioning the Surrogate Court.

Judge Cole concluded that plaintiff and her attorneys acted improperly in their representations to the defendants during the settlement and in their petition to the Surrogate Court. According to Judge Cole, the plaintiff decided that the entire settlement amount should go to her and none should be allocated to the children. To achieve this goal, the petition to the Surrogate Court incorrectly represented that the children had no independent claims and therefore had no interest affected by the settlement agreement. The language in the settlement agreement was also altered to make it appear that it did not cover any potential claims by the children. Judge Cole concluded that the plaintiff and her attorney had deceived both the Surrogate Court and the defendants because the children's potential claims had been an integral part of the original settlement. Judge Cole ordered the plaintiff and her attorneys to make a second petition to the Surrogate Court and readjust

the settlement agreement to properly reflect the parties' agreement as to the children's potential claims. Judge Cole also met informally with the parties and suggested that the defendants be compensated for the attorney's fees incurred for enforcing the settlement agreement. The plaintiff filed a motion for reconsideration a week after the original opinion but Judge Cole denied the motion.

In April 2006, Judge Cole entered the new settlement agreement reached by the parties. He again dismissed the case with leave to reinstate, this time with ninety days, and also stated that he would retain jurisdiction to enforce the settlement. Two weeks later, Ms. Matlaw, on her own behalf and before Judge Marovich, filed objections to the settlement agreement pursuant to Rule 72 of the Federal Rules of Civil Procedure. Ms. Matlaw objected to Judge Cole's findings that she had been dishonest in the settlement proceedings and before the Surrogate Court. She also argued that the April 2006 settlement had effectively reduced the amount of attorney's fees and costs that she would receive.

Apparently, in light of Judge Cole's November 2005 order, the parties had allocated a portion of the original settlement amount to the defendants' attorney's fees incurred in enforcing the settlement agreement. Ms. Matlaw stated that she was to receive a percentage of the award received by the plaintiff. Consequently, her fee amount was reduced under the April 2006 settlement agreement because the overall amount awarded to the plaintiff was less. However, the April 2006 settlement agreement does not mention Ms. Matlaw or any payment of fees to her. Any agreement between her and the plaintiff relating to fees was done separately and not placed in the April 2006 settlement agreement.

Judge Marovich issued an order on May 19, 2006 denying Ms. Matlaw's objections and informing her that his participation in the case ended when the parties consented to the magistrate judge's jurisdiction back in August 2004. His order cited 28 U.S.C. § 636(c)(3) and informed Ms. Matlaw that the ap-

propriate procedure was a direct appeal to the court of appeals. Ms. Matlaw then filed a notice of appeal on May 26, 2006 appealing Judge Marovich's denial of her Rule 72 objections and Judge Cole's November 2005 opinions. Ms. Matlaw presently characterizes her Rule 72 objections as a Rule 59 motion. In July, 2006, Ms. Matlaw filed a Rule 60 motion before Judge Cole to amend the April 2006 settlement agreement arguing there had been a mutual mistake of fact and law by the parties. Judge Cole denied Ms. Matlaw's Rule 60 motion in August 2006. During the briefing of this appeal, the defendants filed a motion with this court arguing Ms. Matlaw's appeal is frivolous and that she should be sanctioned pursuant to Rule 38 of the Federal Rules of Appellate Procedure. The defendants also have a pending motion for sanctions before Judge Cole.

II. ANALYSIS

Ms. Matlaw seeks to overturn the April 2006 settlement agreement and Judge Cole's November 2005 and July 2006 opinions that were critical of her conduct in this case. She argues that she is able to bring this appeal on her own behalf because: (1) Judge Cole's opinions have negatively affected her reputation, and (2) the April 2006 settlement has effectively reduced the amount of attorney's fees and costs she would have otherwise recovered in this case.

The "general rules [is] that a nonparty cannot challenge on appeal the rulings of a district court." *Gautreaux v. Chicago Hous. Auth.*, 475 F.3d 845, 850 (7th Cir. 2007) (citing *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) *(per curiam)*; *B.H. ex rel. Pierce v. Murphy*, 984 F.2d 196, 199 (7th Cir. 1993)). We have recognized that an attorney can bring an appeal on her own behalf when challenging a district court decision imposing monetary sanctions on the attorney, but this rule does not allow an appeal of otherwise critical comments by the district court when no monetary sanctions have been im-

posed. *Crews & Assoc., Inc. v. United States*, 438 F.3d 674, 677 (7th Cir. 2006); *Clark Equip. Co. v. Lift Parts Mfg. Co., Inc.*, 972 F.2d 817, 820 (7th Cir. 1992) (citing *Bolte v. Home Ins. Co.*, 744 F. 2d 572, 573 (7th Cir. 1984)). Judge Cole has not imposed a monetary sanction on Ms. Matlaw in this case and therefore she cannot base her appeal on the alleged damage to her professional reputation regardless of how harmful Judge Cole's comments might have been.

Ms. Matlaw notes that our position of limiting an appeal to monetary sanctions conflicts with the positions taken by other circuits. We recognize that other circuits allow appeals involving critical comments but those circuits have split among themselves over whether the district court must formally sanction the attorney to allow the appeal or whether critical comments by themselves, without a formal sanction, are sufficient for an appeal. *See Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 542-44 (3d Cir. 2007); *Butler v. Biocore Med. Tech. Inc.*, 348 F.3d 1163, 1166-69 (10th Cir. 2003); *Precision Specialty Metals, Inc. v. United States*, 315 F.3d 1346, 1350-53 (Fed. Cir. 2003; *In re Williams*, 156 F.3d 86 (1st Cir. 1998) (discussing the positions of the various circuits in this area of law).

We reaffirm our decision that it is appropriate to limit and appeal to situations involving monetary sanctions only. This limitation on our jurisdiction is based on the realization that allowing appeals by those allegedly harmed by a judge's comments, including "[l]awyers, witnesses, victorious parties, victims, [and] bystanders" would result in a "breathtaking expansion in appellate jurisdiction." *Bolte*, 744 F.2d at 573; *see also Hoagsland ex rel. Midwest Transit Inc. v. Sandberg, Phoenix & Von Gontard, P.C.*, 385 F.3d 737, 740 (7th Cir. 2004) ("Jurisdictional rules ought to be simple and precise so that judges and lawyers are spared having to litigate over not the merits of a legal dispute but where and when those disputes should be litigated. The more mechanical the application of a jurisdictional rule, the better.") (internal citations and quota-

tions omitted). Our rule faithfully adheres to the traditional maxim that as an appellate court we "review . . . judgments, not statements in opinions." *E.E.O.C. v. Chicago Club*, 86 F.3d 1423, 1431 (7th Cir. 1996) (quoting *Black v. Cutter Lab.*, 351 U.S. 292, 297 (1956)); *see, e.g., Acevedo v. Canterbury*, 457 F.3d 721, 723 (7th Cir. 2006) (" '[W]e review judgments, not opinions.' ") (quoting *Rubel v. Pfizer, Inc.*, 361 F.3d 1016, 1020 (7th Cir. 2004)). Finally, as we have recognized in *Bolte*, an attorney is not without a remedy because a petition for mandamus is available. 744 F. 2d at 573.

Ms. Matlaw's other argument for standing is that she has effectively lost money in this case because the April 2006 settlement agreement resulted in reducing the amount of attorney's fees that she was otherwise to receive. However, her claim to attorney's fees was not spelled out in the settlement agreement and it was plaintiff Seymour's actions in this case that resulted in the April 2006 settlement and the alleged reduction in Ms. Matlaw's attorney's fees. Thus, any dispute over whether Seymour's actions breached the client agreement is between Seymour and Ms. Matlaw. This is a traditional contract claim that should be brought in another proceeding. There is no need for the district court to exercise supplemental jurisdiction over this dispute because the original federal claims have already been dismissed. *See* 28 U.S.C. §1367(c); *Baer v. First Options of Chicago, Inc.*, 72 F.3d 1294, 1298-1301 (7th Cir. 1995) (noting a district court's ability to exercise supplemental jurisdiction over a fee dispute between an attorney and client when the agreement to award attorney's fees is codified in the settlement agreement).

Finally, we note the defendant's pending Rule 38 motion for sanctions. A pending motion for sanctions is also before Judge Cole. We concluded that it is better to allow Judge Cole to evaluate that motion first and therefore we deny the defendants' Rule 38 motion. We also note our view that it is in the best interest of all involved that this case be at an end.

III. CONCLUSION

The appeal is dismissed for want of jurisdiction. The defendant's motion for sanctions of June 23, 2006 is denied.

A True Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

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USCA-02-C-0072–5-3-07

APPENDIX B:

May 7, 2007 Order entered in *Seymour v. Hug et al.*, Document Number 154 in No. 04-C-2041 (N.D. Ill.; *unpublished*).

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Jeffrey N. Cole
Sitting Judge if Other than Assigned Judge	
CASE NUMBER	04 C 2041
DATE	5/7/2007
CASE TITLE	Seymour v. Hug

Status hearing held on 5/7/2007. Defendants' motion for sanctions and for fees [142] is withdrawn. All other pending motions [90], [95], and [98] are denied as moot. SEE TEXT BELOW FOR FURTHER DETAILS.

STATEMENT

At my request, the parties appeared in court to discuss the Seventh Circuit's decision of 5/3/2007. Mr. Sanchez and Mr. Howard appeared for the Defendants, Ms. Donaldson was unable to appear. Ms. Matlaw appeared for herself. I discussed with the parties the closing sentence of the Seventh Circuit's opinion in which, after denying the defendant's application for attorneys fees pursuant to Rule 38, Federal Rules of Appellate Procedure, the Court expressed the same view and asked Mr. Howard if he would be willing to withdraw the Motion for Fees. I made it clear to him that he was under no obligation to do so, and I acknowledged his agreement with me prior to the time the fee petition was filed that there were interests that often transcended an award of fees or simply winning or losing a component of litigation, but that events had occurred that precipitated and indeed mandated the filing of the motion. There is simply no question but had those

events not occurred, Mr. Howard would not have filed the motion for fees. At my request, and in light of the luminously clear statement in the Court of Appeals opinion dismissing Ms. Matlaw's appeal, Mr. Howard agreed to withdraw the pending motion for fees.

If ever there were a case where the message of Ecclesiastes should be should be heeded, this is it: "For everything there is a season, and a time for every purpose under heaven. * * * a time for war and a time for peace." Ecclesiastes 3:1,8. With the withdrawal of the motion for fees, the case is, as the Court of Appeals hoped, at long last, "at an end." Slip op. at 8. There are no further proceedings pending in the federal court, and any attempt to revive or revisit any aspect of this litigation would not only be barred but would be in the upmost bad faith and would warrant a significant fee award to the defendants and/or their counsel (depending on the nature of the allegations).

At every stage of this case, Mr. Howard and Ms. Donaldson comported themselves admirably and exhibited those qualities of character and professionalism that all lawyers should possess, but too few do. Therefore, Defendants' motion for sanctions and for fees [142] is withdrawn. All other pending motions [90], [95], and [98] are denied as moot.

APPENDIX C:

January 20, 2007 Oral Argument Order and
December 18, 2006 Order, each having been
entered in *Seymour v. Hug (Appeal of Matlaw)*,
Seventh Circuit No. 06-2502 (*unpublished*).

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

December 22, 2006

Before

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

DONNA L. SEYMOUR	]	Appeal from the United
Plaintiff,	]	States District Court for
	]	the Northern District of
No. 06-2502 v.	]	Illinois Eastern Division
	]	
CAROL HUG and ROGER,	]	No. 04 C 2041
HUG doing business as	]	
RE/MAX TEAM2000,	]	Jeffrey N. Cole,
PATRICIA BROWN-WYRICK,	]	Magistrate Judge
CENDANT MOBILITY	]	
CORPORATION, et al.,	]	
Defendants-Appellees,.	]	
	]	George M. Marovich,
APPEAL OF:	]	Judge.
LESLIE V. MATLAW	]	

Upon consideration of the **APPELLANT'S MOTION TO EXPEDITE DECISIONMAKING**, filed on December 19, 2006, by the pro se appellant,

IT IS ORDERED that the motion is **DENIED**.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

NOTICE OF ORAL ARGUMENT

Date: January 18, 2007

By the court: No. 06-2502

DONNA L. SEYMOUR, Plaintiff,
v.
CAROL HUG and ROGER HUG, doing business as RE/MAX TEAM 2000, PATRICIA BROWN-WYRICK, CENDANT MOBILITY CORPORATION, et al., Defendants-Appellees,

APPEAL OF: LESLIE V. MATLAW

Appeal for the United States Northern District Court for the Northern District of Illinois, Eastern Division
No. 04 C 2041, George M. Marovich, Judge

IT IS ORDERED that this case be orally argued on Tuesday, February 20, 2007, in the Courtroom of the United States Court of Appeals for the Seventh Circuit, 219 S. Dearborn, Room 2721, Chicago, Illinois at 10:30 a.m.

Oral argument will be no more than 10 minutes for each side. Counsel are advised that the panel of judges assigned to oral argument may decide, after reading the briefs, that less time is required for oral argument.

IT IS FURTHER ORDERED that counsel notify the Calendar Clerk (312-435-5850) who will present oral argument by completing and returning the enclosed post card to the court.

Notice must be received in the clerk's office no later than 5 business days prior to the scheduled argument date.

Copies of this notice have been sent to counsel of record.

APPENDIX D:

December 15, 2006 Order entered in *Gathe v. Housing Authority of the City of Lafayette,* Document Number 12-1 in No. 06-CV-1455 (W.D. La.; *unpublished*).

RECEIVED
DEC 15 2006 / S / *gbr*
Robert S. Shemwell, CLERK
Western District Of Louisiana
LAFAYETTE, LOUISIANA

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE/OPELOUSAS DIVISION

Emily B. Gathe — Civil Action 06-1455

versus — Judge Tucker L. Melançon

Housing Authority of Lafayette — Magistrate Judge C. Michael Hill

ORDER

Before the Court is a Motion to Admit Visiting Attorney Pursuant to LR83.2.6W filed by Gregory L. Landry, counsel for plaintiff Emily B. Gathe, to permit Leslie V. Matlaw to appear and participate as a visiting attorney, trial attorney and co-counsel in this action [Rec. Doc. 3]. As required by LR83.2.6W, the applicant notified the Court of the pending disciplinary proceedings against her, In Re: Leslie Valerie Matlaw [Illinois Bar Number 9709176], Illinois Supreme Court's Attorney Registration and Disciplinary Commission Inquiry Number 05-CI-5384, [Rec. Doc. 3, Affidavit of Leslie Matlaw at par. 6] as well as a proceeding pending in the United States Court of Appeals for the Seventh Circuit. This motion was originally set for hearing on September 27, 2006 at 2:00 p.m. [Rec. Doc. 5] and reset for hearing on December 12, 2006 at 11:30 a.m. [Rec. Doc. 7].

In *In re Evans*, 524 F.2d 1004 (5th Cir. 1975), the Fifth Circuit Court of Appeals set forth both the procedural and substantive requirements of denying a pretrial motion to appear pro hac vice. Procedurally, if the court has evidence of behavior that it believes justifies a denial of admission pro hac vice, the court must provide the attorney with adequate notice of all alleged misbehavior or unethical behavior that will be charged against him and the court must set a hearing on the issue. Specific allegations must be made; general accusations about an attorney's demeanor are insufficient. The hearing must be on the record and present the attorney with adequate opportunity to defend himself and his professional reputation. *In Re Evans*, 524 F.2d 1004, 1008 (5th Cir. 1975).

Substantively, admission to a state bar creates a presumption of good moral character that cannot be overcome merely by the whims of the District Court. An applicant for admission pro hac vice who is a member in good standing of a state bar may not be denied the privilege to appear except on a showing that in any legal matter, whether before the particular district court or in another jurisdiction, he has been guilty of unethical conduct of such a nature as to justify disbarment of a lawyer admitted generally to the bar of the court. *In Re Evans*, 524 F.2d 1004, 1007-8 (5th Cir. 1975); *see also USA v. Nolen* ___ F.3d ___, 2006 WL 3598522 at 8 (5th Cir. 2006).

As the Illinois Supreme Court disciplinary proceedings and the matter before the Seventh Circuit Court of Appeals are ongoing, this Court is not in the position to determine whether Ms. Matlaw's conduct during her representation of Donna L. Seymour, plaintiff in the litigation, *Seymour v. Hug, et al*, No 04c2041, United States District Court, Northern District of Illinois, Eastern Division, rises to the level of disbarment. Accordingly, at this time, the Court does not have sufficient information to act on applicant's request.

IT IS ORDERED that the hearing scheduled for Tuesday, December 12, 2006 at 11:30 a.m. is UPSET to be refixed

upon a decision by the Illinois Supreme Court disciplinary council and the decision by the Seventh Circuit Court of Appeals.

IT IS FURTHER ORDERED that applicant file in to the record of this proceeding a copy of all of the parties briefs in the Seventh Circuit proceeding as they are filed.

IT IS FURTHER ORDERED that the Clerk of Court or his designee shall serve a copy of this order on applicant Leslie V. Matlaw, at the address provided in her Motion to Admit Visiting Attorney [Rec. Doc. 3].

THUS DONE AND SIGNED in Lafayette, Louisiana, on this 12th day of December, 2006.

/ S / Tucker L. Melançon
United States District Court Judge

Copy Sent:
DATE: 12-15-06
BY: / S / gbr
TO: Matlaw -mailed

APPENDIX E:

August 3, 2006 Decision,
Document Number 140 in
No. 04-C-2041 (N.D. Ill.; *unpublished*).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DONNA L. SEYMOUR, *Plaintiff*,	)	
v.	)	Case No. 04 C 2041.
CAROL HUG and ROGER HUG,	)	
d/b/a REMAX TEAM 2000;	)	Magistrate Judge
PATRICIA BROWN-WYRICK;	)	Jeffrey Cole
CENDANT MOBILITY CORP.,	)	
a Corporation; and CURTIS	)	
CASTLE and CAROL CASTLE,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

INTRODUCTION

This case has its genesis in Donna L. Seymour's unsuccessful attempt to purchase a home in a suburb of Chicago from realtors, Roger and Carol Hug, Patricia Brown-Wyrick and H&H Realty, Inc. and Cendant Mobility Corp. and Curtis and Carol Castle. According to Ms. Seymour, although she had successfully negotiated a contract for the purchase of the home, the defendants "sold it out from under her" when they discovered she was African-American. On March 18, 2004, Ms. Seymour filed a complaint alleging unlawful discrimination against her on the basis of race in violation of the Fair Housing Act, 42 U.S.C. §§ 3604, 3605, 3617, and breach of contract under Illinois state law. A week later, she amended her complaint, and she did so again on August 20, 2004. Discovery ensued as did intensive settlement discussions.

After much back and forth, the parties agreed upon terms of settlement. Since the plaintiff's minor children were implicated in the case, although not formally named as parties, the defendants insisted on a release of any potential claims by

them approved by the Surrogate's Court in New York. It was agreed that some (minimal) amount of the $40,000 that was being paid to Ms. Seymour would be allocated to her children so that there could be no question about whether the release was supported by consideration. On this issue, the defendants were unyielding. Ms. Seymour's lawyers agreed that there would be an allocation and counsel for the defendants were informed that there was a settlement and its terms were spelled out through an exchange of emails.

From that point on, things dramatically devolved: Ms. Seymour informed her lawyers she would not agree to any allocation, and her *volte face* was concealed from defense counsel by her lawyers. In addition, the allocation requirement in the formal settlement agreement was deleted by Ms. Seymour's lawyers, and the importance of the deletion minimized and misrepresented. Contrary to the terms of the settlement agreement and the requirements of New York law, Ms. Seymour's lawyers failed to "fully apprise" the Surrogate's Court of all of the information needed to make an informed determination of whether the settlement "was in the childrens' best interests." Quite the contrary; they affirmatively misled the Court by making it appear that the children had no possible claims and no involvement the discrimination against their mother.

Ultimately, the defendants became suspicious and demanded answers, which were not immediately forthcoming. Ultimately, all that had occurred was revealed. Both sides insisted that they were in the right, and that they had been ill-used by their colleagues. Cross-motion to enforce their respective versions of the settlement agreement ensued. The squalid details are discussed in *Seymour v. Hug*, 413 F.Supp.2d 910 (N.D.Ill. 2005). I concluded that the defendants' were in the right and that Ms. Seymour's lawyers had misled their colleagues and the Surrogate's Court in New York. I ordered what in effect was specific performance of

what I found to be the agreement that Ms. Seymour and the defendants had made. The defendants, not surprisingly, had sought an award of attorneys' fees. Since the request was essentially unsupported and unexplained, I ordered additional briefing. *Id.* at 933. The plaintiffs' motion for reconsideration was denied on November 10, 2005. *Id.*[1]

Thereafter, in an informal meeting in my chambers with counsel for both sides, including Ms. Matlaw, I suggested that counsel might consider agreeing on a mutually acceptable figure that would compensate the defendants for the work that they had done in connection with the plaintiff's motion to enforce the settlement agreement and in their cross-motion. In due course, Ms. Seymour's lawyers complied with the terms of the settlement agreement and apprised Judge Seibert of all that had occurred. In early April 2006, an agreement on fees was reached between the defendants and Ms. Matlaw and her co-counsel that was approximately half the amount that the defendants contended they had expended in legal fees.

On April 10, 2006, I entered an order - prepared by Ms. Matlaw's co-counsel - captioned "Settlement Order." To the opening sentence, "this matter coming on to be heard on the motion for entry of a settlement order and the Court being fully advised in the premises," - I added in my handwriting, the following: "that the case is settled:" I initialed my handwritten addition.[2] The order went on to provide that within 14 days certain payments would be made, which included payments for attorneys' fees to the defendants that

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[1] The punctuation after the word "settled" is a colon, not a question mark.

[2] The motion for reconsideration was based on a false factual premise, which the plaintiff's lawyer, Ms. Matlaw, ultimately was forced to concede. The motion for reconsideration was ill-considered and baseless.

Ms. Matlaw and her co-counsel had undeniably agreed to do. Paragraph 3 of the order provided that the case was dismissed without prejudice, with the court to retain jurisdiction for 90 days to enforce the settlement agreement.

On April 26, 2006, Ms. Matlaw, acting on her own behalf, filed "Objections" with Judge Marovich to my order of April 11, 2006, even though Judge Marovich had no jurisdiction since the case was here by consent since August 25, 2004. On May 3, 2006, I granted the defendants' motion to modify the order to extend for 10 days compliance with the settlement agreement. Meanwhile, on May 19, 2006, Judge Marovich denied Ms. Matlaw's objections since jurisdiction to hear any appeal from final orders or magistrate judges in consent cases lies exclusively with the Court of Appeals. *See* 28 U.S.C. §636(c)(3). Judge Marovich's order was docketed on May 23, 2006. On May 26, 2006, Ms. Matlaw filed her notice of appeal to the Seventh Circuit of Judge Marovich's denial of her "objections" to my April 11, 2006 order, which the notice of appeal states "is also being appealed herein."

While her case is pending in the court of appeals, Ms. Matlaw has returned here and asked me to "rescind" the post-November 10, 2005 fee arrangement she admittedly made with the defendants.[3] She contends that Rule 60(b), Federal Rules of Civil Procedure, authorizes the relief since the agreement is "unenforceable having resulted from a material Mutual Mistake of Fact (that defendants could incur liability to the Minors upon their achieving majority, and that Plaintiff's Initial Petitions to Approve Settlement on their behalf, in not advising of such "springing liability," was materially deceptive in the manner by which she sought the Judge's approval." (*Amended and Supplemented Memorandum of*

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[3] Although the agreement was not signed, Ms. Matlaw's supporting memorandum concedes both its enforceability (in the absence of fraud mistake) (*Memorandum* at unnumbered page 2).

Law in Support of Counsel's Request for Partial Relief From Judgment at unnumbered page 2) (parenthesis in original). Astonishingly, Ms. Matlaw notes that she seeks no sanctions against the defendants. (*Id.* at unnumbered page 5).[4] This statement, especially in the overall context of the case, "bring[s] to mind George Jacques Danton's famous phrase — *l'audace, encore de l'audace, toujours de l'audace* (audacity, more audacity, always audacity) ...." *United States v. Walsh*, 700 F.2d 846, 850 (2d Cir. 1983) (parenthesis in original).

The motion is supported by general propositions about mutual mistake of fact and their effect on contract formation. But "general propositions do not decide concrete cases." *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). *See also Daubert v. Merrell Dow*, 509 U.S. 579, 598 (1993) (Rehnquist, C.J. concurring in part and dissenting in part) (" 'general observations' " suffer from the common flaw that they are not applied to the specific matter and "therefore they tend to be not only general, but vague and abstract."); *Wisehart v. Davis*, 408 F.3d 321, 326 (7th Cir. 2005) (Posner, J.).

In the instant case, the argument that there has been a "bedrock mutual mistake of fact or of law," and a "uniform misapprehension of New York law" is frivolous and ignores the November 8, 2005 opinion and the denial of Ms. Matlaw's motion for rehearing on November 10, 2005.[5] There were no material mistaken assumptions on which Ms. Matlaw and the defendants based their fee agreement. It is nonsensical to suggest that there was a mutual mistake of fact

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[4] The parties are agreed that the pendency of Ms. Matlaw's appeal in the Seventh Circuit does not deprive me of jurisdiction to hear this motion, and I am proceeding on that assumption.

[5] [*N.b.*, (Petitioner's Note): This footnote contains no text.]

regarding what I found to be the materially deceptive manner in which Ms. Matlaw sought the Surrogate's Court's approval. Ms. Matlaw certainly did not agree with that holding, and indeed, protested vigorously at the oral argument today that she was innocent of any wrongdoing. Thus, the parties did not proceed on some shared misperception about what the opinion said or its validity.[6] Similarly, there was no mutual mistake of fact regarding the question of consideration for the release of the children. As explained in the November 8 and 10, 2005 opinions, the defendants insisted that there be an allocation to the children so that there could be no future claim that the release was invalid because unsupported by consideration. It did not matter whether the defendants' concerns about New York law's requiring consideration for a release were well-founded or whether New York law did or did not actually have such a requirement. As discussed in detail in the November 10th opinion, the defendants bargained for some payment to the children to alleviate the possibility of a future claim, and Ms. Seymour's lawyers agreed to it.

Thereafter, Ms. Seymour changed her mind, but her lawyers chose not to tell the defendants and allowed them to proceed on the mistaken assumption that there was going to be an allocation. Consistent with their concealed breach of the settlement agreement, Ms. Seymour's lawyers gulled the Surrogate's Court as described at length in the November 8th and 10th opinions. The only mistake of fact in this case is unilateral and was the defendants who relied, foolishly as it turns out, on Ms. Seymour's lawyers' representations.

Finally, Ms. Matlaw's present contention that there was a mutual mistake of fact regarding the applicability of the statute

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[6] If Ms. Matlaw concluded that the opinion was correct, that is not a mutual mistake of fact as that term is used in the law.

of limitations to any claims that might be brought by the children is singularly disingenuous. (*Plaintiff's Memorandum* at unnumbered page 9). As pointed out in the November 10th opinion, the statute of limitations was never discussed with defense counsel. 413 F.Supp.2d at 934.

If Ms. Matlaw thought the November 8 and November 10 decisions wrong, her recourse was not to have agreed to pay the defendants' attorneys' fees in connection with the misconduct that I found existed, but rather to have allowed a fee award to be entered - if in fact it was deemed appropriate - and then to appeal that award. She chose a very different course, and she is bound by her voluntary decision.[7] In effect, Ms. Matlaw's agreement with the defendants regarding the question of liability for attorneys' fees constituted a settlement agreement with the defendants on the discreet issue of her liability for attorneys' fees. A settlement agreement is a contract and is governed by principles of law applicable to contracts generally. *Lumpkin v. Envirodyne Industries, Inc.*, 933 F.2d 449, 455 (7th Cir.), *cert. denied*, 502 U.S. 939 (1991). Parties to a settlement agreement, otherwise enforceable, cannot avoid the agreement merely because one of them has second thoughts. *Taylor v. Gordon Flesch Co.*, 793 F.2d 858, 863 (7th Cir. 1986). This principle is reflective of the more encompassing principle that since equity does not act to relieve parties of voluntarily undertaken obligations, in order to rescind a settlement agreement, the disgruntled party must demonstrate through clear and convincing evidence that the agreement was entered into as a result of fraud or mutual

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[7] Following the November 10th denial of the motion for reconsideration, Ms. Seymour terminated her relationship with Ms. Matlaw and agreed to all the terms of the settlement, with which she faithfully complied. Ms. Seymour was thus acting on her own behalf.

mistake. *Cameron v. Bojusz*, 305 Ill.App.3d 267, 271, 711 N.E.2d 1194, 1197 (1999); *Melzer v. Bausch & Lomb, Inc.*, 193 Ill.App.3d 59, 549 N.E.2d 817 (1989). Those factors are strikingly absent here.[8]

Neither the shortness of life nor the scarcity of judicial resources can countenance an approach to settlement agreements that makes them test runs, subject to revision whenever a party decides she does not like the terms.

In sum, there was no mutual mistake of fact on which the original settlement was bottomed, and there most assuredly was no mutual mistake of fact (or law) on which Ms. Matlaw's agreement to pay attorneys' fees to the defendants was based. Ms. Matlaw's current motion simply ignores all that has occurred in the case, and effectively puts out of view the November 8th and November 10th opinions. It is, in some ways, nothing more than a thinly disguised motion to reconsider those decisions. Apart from being frivolous, it is untimely under Rule 59(e), Federal Rules of Civil Procedure. Ms. Matlaw's motion for partial relief from judgment [125] [126] is denied.[9]

ENTERED: / S / Jeffrey Cole
United States Magistrate Judge

DATE: 8/3/06

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[8] Even preposterous terms are enforceable if that is what is actually intended. *Beanstalk Group, Inc. v. AM General Corp.*, 283 F.3d 856 (7th Cir. 2002) (Posner, J.).

[9] Ms. Matlaw said that the mutual mistake was not apparent until Judge Seibert had issued his orders, although she could not explain how those orders affected the present issues. Moreover, Judge Seibert's orders were issued months before Ms. Matlaw's present motion. Ms. Matlaw also said that she continues to represent Ms. Seymour even to this day and thus, quite apart from the fact that orders are matters of public record, she would have known about the order, which she now claims is so critical to her motion.

APPENDIX F:

May 19, 2006 Order Denying Motion originally filed by Petitioner on April 26, 2006 and thereafter amended and supplemented (Post-Judgment "Rule 72 Objections to Magistrate Judge's Order"), Document Number 103 in No. 04-C-2041 (N.D. Ill.; u*npublished*).

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	George M. Marovich
Sitting Judge if Other than Assigned Judge	
CASE NUMBER	04 C 2041
DATE	5/19/06
CASE TITLE	Seymour v. Hug

Plaintiff's Objections are denied. Motion hearing set for May 24, 2006 is stricken.

/ S / George M. Marovich

For further details see below. Docketing to mail notices.

STATEMENT

When plaintiff Donna L. Seymour ("Seymour") filed her complaint in March 2004, the case was assigned to this Judge. On or about August 19, 2004, every party to this case signed a consent form, thereby consenting to proceed before the Magistrate Judge for all proceedings through and including judgment. On August 25, 2004, this Court entered an order reassigning the case to the Magistrate Judge.

Since that time, this case proceeded before the Magistrate Judge (originally Magistrate Judge Levin and, since May 6, 2005, Magistrate Judge Cole). On April 11, 2006, Judge Cole entered an order dismissing the case without prejudice due to the parties' report that the case had settled. Judge Cole retained jurisdiction over the case for 90 days and stated that the dismissal would be automatically changed to a dismissal with prejudice if the case were not reinstated within 90 days. After additional motions, Judge Cole entered an order on May 3, 2006 modifying the April 11, 2006 order and granting defendants ten days to comply with the settlement agreement.

Plaintiff's attorney has now noticed before this Court objections to Judge Cole's order, citing Rule 72(a) of the Federal Rules of Civil Procedure as the authority. Nothing in Rule 72 provides this Court the authority to review Judge Cole's order. Rule 72(a) allows a party to file objections with the district court with respect to an order a magistrate enters with respect to "a pretrial matter not dispositive of a claim or defense of a party" that the district judge "referred" to the magistrate judge. *See Fed. P. Civil P. 72(a)*. By its plain language, Rule 72(a) applies only to orders on pre-trial, non-dispositive matters the district court referred to the magistrate. Nor does Rule 72(b) apply. That rule allows a party to file with the district court objections to an order by a "magistrate judge assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party . . ." *See Fed. R. Civ. P. 72(b)* (emphasis added). These rules do not apply because, in this case, the order Magistrate Judge Cole entered was neither an order on a pre-trial matter referred to him by this Judge nor an order on a dispositive matter referred without consent. Rather, these parties consented to proceed before the Magistrate for all proceedings through and including final judgment.

In a case such as this, where the parties have consented to proceed before the Magistrate for all matters through and including judgment, the parties *still* have a means of having the Magistrate Judge's orders reviewed, but it is not at the district court. Rather, 25 U.S.C. § 636(c)(3) allows such a party to "appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court." *See* 28 USC § 636(c)(3).

Because the Court has no authority to review Magistrate Judge Cole's order, this Court hereby denies the plaintiff's objections and strikes the May 24, 2006 hearing date.

APPENDIX G:

April 11, 2006 Final Settlement Order
(entered April 14, 2006), Document
Number 89 in No. 04-C-2041
(N.D. Ill.; *unpublished*)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DONNA L. SEYMOUR, Plaintiff,
v.
CAROL HUG and ROGER HUG, d/b/a REMAX TEAM 2000; PATRICIA BROWN-WYRICK; CENDANT MOBILITY CORP., a Corporation; and CURTIS CASTLE and CAROL CASTLE, Defendants.

Case No. 04 C 2041.

Magistrate Judge Jeffrey Cole

SETTLEMENT ORDER

This matter coming on to be heard on the motion for entry of a settlement order and the Court being fully apprised in the premises, [handwritten insertions: " */ S /* JC that the case is settled : "]

IT IS HEREBY ORDERED THAT:

1. Within fourteen (14) days of the date of entry of this order Defendants shall deliver the following checks:

    a. A check made payable to The John Marshall law School in the amount of $13,333.00 delivered to F. Willis Caruso, 28 E. Jackson Blvd., Suite 500, Chicago, Illinois 60604

    b. A check made payable to Donna Seymour in the amount of $27,667 delivered to her attorney, Andrew C. Blumenberg, 440 Route 146, Clifton Park, New York, 12065

2. Within fifteen (15) days of the date that the Check for $13,333.00 made payable to The John Marshall Law School clears, The John Marshall Law School shall deliver to the Defendants the following checks:

    a. A check made payable to Cozen O'Connor Trust. for the benefit of Certain Underwriters of Lloyds. Ref. REPM No. 084334.000 in the amount of $3,000.

    b. A check made payable to Sanchez & Daniels Client Account in the amount of $14,916.00.

3. The case is dismissed without prejudice and the Court retains jurisdiction for enforcement of this Settlement Order for ninety (90) days.

4. At the end of the ninety (90) days, if the parties have not requested additional action by the Court, the Court will enter a Final Order dismissing the case with prejudice.

Enter: /S/ Jeffrey Cole
[handwritten: Magistrate] Judge

Dated: 4/11/06

Order Prepared by:

F. Willis Caruso
The John Marshall Law School
Fair Housing Legal Clinic
28 E. Jackson Blvd., Suite 500
Chicago, Illinois 60604
(312) 786-2267

APPENDIX H:

March 30, 2006 Orders of the New York Surrogate's Court (Document Number 86 in No. 04-C-2041 (N.D. Ill.; *unpublished*)) and Reports of the New York Surrogate's Court Guardian *Ad Litem* (Document Numbers 84-1 *and* 84-2 in No. 04-C-2041 (N.D. Ill.; *unpublished*)).

STATE OF NEW YORK
FOURTH JUDICIAL DISTRICT
SARATOGA COUNTY SURROGATE'S COURT

County of Saratoga)
State of New York) ss
Surrogate's Office
Recorded on the 30th
day of MARCH, 2006
In 46 [illegible] Orders 92
/ S / Debra D. Baker, Court Clerk

In re the Estate of	)	**ORDER**
PETER. MADKIN, JR.	)	File #1836-78
A Minor.	)	Judge Harry W. Siebert, Jr.

The petitioner Donna Seymour, the parent and guardian of the above Minor ward, having moved this Court, on December 7, 2005, to approve a Settlement Agreement and Consent Order in Case No. 04 C 2041, and the parties having come to be heard on the 10th day of January, 2006,

Now, upon reading the petition, which was filed December 7, 2005 and reviewing the recommendation of the Guardian ad litem, James G. Snyder, it is

ORDERED that the petition be granted in full and specifically that:

A) The above Minor Ward receive One thousand dollars ($1000) to be issued from the settlement proceeds to Donna Seymour as Guardian of Peter Madkin, Jr. jointly with Saratoga Co. Surrogate's Court.

B) That an allowance be made to James G. Snyder, Esq. as guardian ad litem of Peter Madkin, Jr. in the amount of $2126.00.

C) That an allowance be made to Andrew C, Blumenberg, as attorney for petitioner, in the amount of $1,000.

D) Donna Seymour, Guardian file with this Court proof of deposit of said funds.

Enter.

Dated: March 30, 2006 / S / Harry W. Siebert, Jr.
Surrogate

STATE OF NEW YORK Saratoga County Surrogate's Court
SURROGATE'S COURT **[File Stamp]**
SARATOGA COUNTY FILED MAR 7 2006

In the Matter of Guardianship Proceeding of
REPORT OF
GUARDIAN AD LITEM
PETER LANE MADKIN, JR. File # 1836-78

I, James G. Snyder, Counselor-At-Law, having been duly appointed the Guardian ad Litem of PETER LANE MADKIN, JR., infant for the purpose of appearing for and protecting his interest in the above entitled proceeding, do hereby report as follows:

FIRST: That the interest of said infant is that of proposed recipient of a portion of money out of the proceeds of the lawsuit commenced and prosecuted by Donna Seymour, his mother in Illinois.

SECOND: That I have examined the papers purporting to be the Petition and Affidavit of Minors Guardian to Approve Settlement dated 5/20/05 and proof of service herein and all other papers in this proceeding and the previous petition and order seeking similar relief. The proceeding was brought in Illinois District Court for racial discrimination in the purchase of a home by my ward's mother. She sued the case as plaintiff individually without including her children as plaintiffs. The matter in Illinois can be settled in the amount of $40,000.00, if approved. Petitioner proposes to receive

$24,776, as her share of the settlement less attorneys' fees with $1,000.00 each going to her children. She originally petitioned this Court for approval of a similar settlement without requesting that her children receive money. That petition was approved by this Court. Subsequently, the magistrate in Illinois directed that some portion of the settlement proceeds be distributed to the children. Petitioner has proposed $1,000 to each child. It appears that one of the reasons the money for the children was proposed is that the defendants in said case seek releases from the children in addition to the plaintiff.

THIRD: I have researched these issues extensively and have had several phone conversations and correspondence with Petitioner's attorneys and on of the defense attorneys in the Illinois action. In my opinion, New York law does not require that the infants receive any portion of this settlement unless they were

parties to this action. Furthermore, it is difficult to understand how they would have any viable claims in said action as the facts have been explained to me. All of the above notwithstanding, I recommend to this Court that the settlement as proposed be approved and the release be signed as presented. As guardian ad litem for said ward, I cannot decline the offer to my ward of $1,000.00 no matter how it is obtained. The plaintiff's attorneys are entitled to their one-third pursuant to a retainer agreement. After payment of the expenses of this matter in Surrogate's Court, Donna Seymour should be entitled to the balance of the settlement proceeds.

Dated: March 3, 2006

/ S / *James Snyder* Guardian ad Litem

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4/10/2006 11:46 518-884-4774 S ARA CO SURR CT PAGE 04 / 05

Case 1:04-cv-02041 Document 86-2 Filed 04/10/2006 Page 3 of 5

STATE OF NEW YORK Saratoga County Surrogate's Court
SURROGATE'S COURT **[File Stamp]**
SARATOGA COUNTY FILED MAR 7 2006

In the Matter of Guardianship Proceeding of
REPORT OF
GUARDIAN AD LITEM
DEVIN LAUREN MADKIN File # 1836-79

I, James G. Snyder, Counselor-At-Law, having been duly appointed the Guardian ad Litem of DEVIN LAUREN MADKIN, infant for the purpose of appearing for and protecting his interest in the above entitled proceeding, do hereby report as follows:

FIRST: That the interest of said infant is that of proposed recipient of a portion of money out of the proceeds of the lawsuit commenced and prosecuted by Donna Seymour, her mother in Illinois.

SECOND: That I have examined the papers purporting to be the Petition and Affidavit of Minors Guardian to Approve Settlement dated 5/20/05 and proof of service herein and all other papers in this proceeding and the previous petition and order seeking similar relief. The proceeding was brought in Illinois District Court for racial discrimination in the purchase of a home by my ward's mother. She sued the case as plaintiff individually without including her children as plaintiffs. The matter in Illinois can be settled in the amount of $40,000.00, if approved. Petitioner proposes to receive

$24,776, as her share of the settlement less attorneys' fees with $1,000.00 each going to her children. She originally petitioned this Court for approval of a similar settlement without requesting that her children receive money. That petition was approved by this Court. Subsequently, the magistrate in Illinois directed that some portion of the settlement proceeds be distributed to the children. Petitioner has proposed $1,000 to each child. It appears that one of the reasons the money for the children was proposed is that the defendants in said case seek releases from the children in addition to the plaintiff.

THIRD: I have researched these issues extensively and have had several phone conversations and correspondence with Petitioner's attorneys and on of the defense attorneys in the Illinois action. In my opinion, New York law does not require that the infants receive any portion of this settlement unless they were

parties to this action. Furthermore, it is difficult to understand how they would have any viable claims in said action as the facts have been explained to me. All of the above notwithstanding, I recommend to this Court that the settlement as proposed be approved and the release be signed as presented. As guardian ad litem for said ward, I cannot decline the offer to my ward of $1,000.00 no matter how it is obtained. The plaintiff's attorneys are entitled to their one-third pursuant to a retainer agreement. After payment of the expenses of this matter in Surrogate's Court, Donna Seymour should be entitled to the balance of the settlement proceeds.

Dated: March 3, 2006

/ S / *James Snyder* Guardian ad Litem

STATE OF NEW YORK
FOURTH JUDICIAL DISTRICT
SARATOGA COUNTY SURROGATE'S COURT

County of Saratoga)
State of New York) ss
Surrogate's Office
Recorded on the 30th
day of MARCH, 2006
In 46 [illegible] Orders 92
/ S / Debra D. Baker, Court Clerk

In re the Estate of	)	**ORDER**
DEVIN LAUREN	)	File #1836-79
MADKIN, A Minor.	)	Judge Harry W. Siebert, Jr.

The petitioner Donna Seymour, the parent and guardian of the above Minor ward, having moved this Court, on December 7, 2005, to approve a Settlement Agreement and Consent Order in Case No. 04 C 2041, and the parties having come to be heard on the 10th day of January, 2006,

Now, upon reading the petition, which was filed December 7, 2005 and reviewing the recommendation of the Guardian ad litem, James G. Snyder, it is

ORDERED that the petition be granted in full and specifically that:

A) The above Minor Ward receive One thousand dollars ($1000) to be issued from the settlement proceeds to Donna Seymour as Guardian of Devin Lauren Madkin, Jr. jointly with Saratoga Co. Surrogate's Court.

B) That an allowance be made to James G. Snyder, Esq. as guardian ad litem of Devin Lauren Madkin, in the amount of $2126.00.

C) That an allowance be made to Andrew C, Blumenberg, as attorney for petitioner, in the amount of $1,000.

D) Donna Seymour, Guardian file with this Court proof of deposit of said funds.

Enter.

Dated: March 30, 2006 / S / Harry W. Siebert, Jr.
Surrogate

APPENDIX I:

November 8, 2005 Opinion and Order *and*
November 9, 2005 Opinion on Plaintiff's
Motion for Reconsideration, Document Numbers
65 *and* 69, respectively, in No. 04-C-2041
(N.D. Ill.; *published at* 413 F. Supp. 2d 910
(N.D. Ill. 2005), 2005 WL 3050635).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DONNA L. SEYMOUR, Plaintiff,
v.
CAROL HUG and ROGER HUG, d/b/a REMAX TEAM 2000; PATRICIA BROWN-WYRICK; CENDANT MOBILITY CORP., a Corporation; and CURTIS CASTLE and CAROL CASTLE, Defendants.

Case No. 04 C 2041.

Magistrate Judge Jeffrey Cole

MEMORANDUM OPINION AND ORDER [1]

INTRODUCTION

This case has its genesis in Donna L. Seymour's unsuccessful attempt to purchase a home in a suburb of Chicago from realtors, Roger and Carol Hug, Patricia Brown-Wyrick and H & H Realty, Inc. (collectively "Realtor Defendants"), and Cendant Mobility Corp. and Curtis and Carol Castle (collectively "Owner Defendants"). According to Ms. Seymour, although she had successfully negotiated a contract for the purchase of the home, the defendants "sold it out from under her" when they discovered she was African-American. On March 18, 2004 Ms. Seymour filed a complaint alleging unlawful discrimination against her on the basis of race in violation of the Fair Housing Act, 42 U.S.C. §§3604, 3605, 3617, and breach of contract under Illinois state law. A week later,

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FN1. The case is before me pursuant to the parties' consent. 28 U.S.C. §636(c).

she amended her complaint, and she did so again on August 20, 2004. Discovery ensued as did intensive settlement discussions.

On May 24, 2005, the parties filed a Joint Status Report, stating that they "were in the process of finalizing an agreed settlement," and that they had "agreed in principle to a settlement of all claims. A condition of the settlement is that plaintiff must seek approval from the Surrogate's Court in New York, the state of residence of plaintiff and her children, in order to procure a valid release of any potential claims of her minor children." (*Id.*) [2] On June 20, 2005, counsel for certain of the defendants reported at a status hearing that the case was settled, and that the execution of the formal settlement agreement by all parties was imminent. Accordingly, I dismissed the case with leave to reinstate within 60 days in the event of any unanticipated problem and retained jurisdiction to enforce the settlement agreement. [3]

FN2. The approval of the New York court was necessary because a release by a parent does not bind the child. *Santangelo v. City of New York*, 66 A.D.2d 880, 881, 411 N.Y.S.2d 666 (1978).

FN3. Enforcement of a settlement agreement is more than a continuation of a dismissed suit and thus, requires a separate basis for federal jurisdiction. *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 378 (1994). The Supreme Court has instructed that a district court retains jurisdiction over enforcement of a settlement agreement if the court either: (1) expressly retains its jurisdiction over the agreement, or (2) incorporates the agreement's terms into its dismissal order. *Id.* at 381. The dismissal order must not provide that the dismissal is with prejudice or the court will not have post-dismissal jurisdiction, even if the order provides for a retention of jurisdiction to enforce a settlement. *Lynch, Inc. v. SamataMason, Inc.*, 279 F.3d 487, 489 (7th Cir. 2002); *Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002). As I conditionally dismissed this case without prejudice and expressly retained jurisdiction to enforce the settlement agreement, there is jurisdiction to resolve the present dispute.

Apparently, over the course of the next week, the defendants concluded that they had been had - and rather badly at that - by the plaintiff and her lawyers. They demanded that Ms. Seymour make further application to the Surrogate's Court and provide the Court with the information they insisted she had withheld. The plaintiff's lawyers refused. On June 29, 2005, Ms. Seymour filed this present Motion to Enforce the Settlement Agreement or, in the Alternative, to Vacate Dismissal, Reinstate Case, and Enter Judgment on the Agreement. On July 15, 2005, the defendants filed a Cross Motion to Enforce Settlement and For Fees, in which they contend that Ms. Seymour failed to comply with the terms of the parties' March 14, 2005 settlement agreement. The motion argued that Ms. Seymour and her lawyers had deceived the defendants and the Surrogate's Court in New York into approving the settlement of the instant case and authorizing a release of the claims of Ms. Seymour's children. [4] Ms. Seymour's view of the matter is, predictably, quite different. She

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FN4. Although the word "fraud" does not appear in the defendants' briefing, the accusation of fraud is beyond debate. For example, the plaintiff and her counsel are accused of: having made "substantial and material" "misrepresentations to the [Surrogate's] Court"; having "acted in bad faith" of having filed petitions with the Surrogate's Court containing "blatant misrepresentations"; having concealed [plaintiff's] change in position and thereafter attempt[ing] to unilaterally change the agreed upon terms of the settlement by manipulating the language in drafts of the release; having "[s]urreptitiously utiliz[ed] a modified form of the" April 28th version of the settlement and release; having without authorization changed the language of the formal agreement approved by the defendants; having made "patently false" representations to the Surrogate's Court in New York; having withheld critical information from that court; having falsely informed the [Surrogate's Court] that any claims held by the minors were not contemplated, resolved and/or encompassed by the settlement of the underlying action"; and having "deceiv[ed] and mislead [ ]" the Surrogate's Court and having used "deception in an effort to prevent any of the money from going into the children's' trust . . . ." (*Joint Brief in Support of Defendants' Cross-Motion to Enforce Settlement* at 10, 12, 13; *Defendants' Reply Brief* at 4, 6, 9, 11, 12-14).

denies that there was any settlement on March 14th and insists that the settlement is that contained in a document prepared by the defendants on April 28, 2005, which required that she obtain a release of the childrens' claims. For her, form is substance, and having obtained on May 20, 2005 an order of the Surrogate's Court approving the settlement and releasing any claims of her children, her obligations have been fulfilled.

The difficulty, however, is that form is not substance, and Ms. Seymour's contention that she has complied with the terms of the settlement agreement merely by securing an order of the Surrogate's Court, regardless of the circumstances under which the order was obtained, is plainly mistaken. Under New York law, the Surrogate's Court had to be "fully apprised" of all the relevant facts and circumstances in order to make an informed determination of whether the approval of the settlement was in the children's "best interest." Unless that occurred, the defendants would be subject to precisely the risks of future litigation by Ms. Seymour's children that the settlement agreement was designed to avoid. Only the "latitudinarian attitude of Alice in Wonderland towards language," *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 654 (1949) (Frankfurter, J., dissenting), could support the plaintiff's contention that the petitions Ms. Seymour filed in New York fully and properly informed the Court of the nature of the children's claims and the allegations made by Ms. Seymour in the underlying action. The disquieting reality is that the Surrogate's Court was ill-served by Ms. Seymour and her legal advisors, and that by failing to comply with New York law in her presentation to the Surrogate's Court, Ms. Seymour breached the settlement agreement she made with the defendants.

I. FACTUAL BACKGROUND

A. The Complaints, Discovery, And Early Settlement Demands

All of Ms. Seymour's pleadings repeatedly referred to her "family" and "children." The complaint and amended complaint charged that she "celebrated with her children having successfully negotiated for their new home." (*Compl.*, at ¶60; *Am. Compl.*, at ¶57). She also alleged that she brought her children to see the home. (*Am. Compl.*, at ¶49). All three versions of her complaint alleged that the defendants' actions caused Ms. Seymour "*and her family* economic injury, consequential damages and personal harm," (*Compl.*, at ¶¶77, 80, 82, 84; *Am. Compl.*, at ¶¶102, 105, 107, 109; 2nd Am. Compl., at ¶¶111, 114, 116, 118) (emphasis supplied), and requested compensatory and punitive damages "for discrimination against her *and her children*." (*Compl.*, at ¶84 Prayer; Am. Compl., at ¶¶102 Prayer (d), 105 Prayer (d), 107 Prayer (d); *2nd Am. Compl.*, at ¶¶111 Prayer (d), 114 Prayer (d), 116 Prayer (d)) (emphasis supplied).

Consistent with these allegations of harm to her children, in the complaints, Ms. Seymour demanded in August 2004 that in addition to payment of $150,000 in damages to her, her two children were entitled to $50,000 "to compensate them for defendants' illegal actions, and the resulting emotional distress." (*Defendants' Brief*, Ex. B). Ms. Seymour's insistence that her children were harmed by the defendants' actions - and thus had their own claims - continued into discovery. When asked at her deposition in December 2004 to explain what damages were being claimed, Ms. Seymour said that it had been "a very painful experience for myself, for my children," and that she relocated "my family because of this occurrence." (*Defendants' Br.* Ex. C at 34). When counsel for the owner defendants, asked if Ms. Seymour understood that

her children were not party to this lawsuit, Ms. Seymour responded that while her children were not parties, "my children have been affected by the discrimination that this lawsuit is about ...." *Id.* at 35.

When asked if she was making a claim on behalf of her children, Ms. Seymour declared: "My children's lives have been *forever altered* as a result of this lawsuit, which was us having to relocate across the country. I have not chosen *at this time* to file a lawsuit on their behalf." *Id.* (Emphasis supplied). There then followed this telling exchange between Ms. Donaldson and Ms. Seymour:

> Q: Are you making a claim in this lawsuit for damages that you claim were suffered by your children as a result of this transaction?
> A: I'm making a claim in this lawsuit that *my children's lives have been affected by what has occurred in this transaction.*
> Q: And you're making that claim despite the fact that your children are not plaintiffs and this action is not brought on their behalf.
> A: That's correct.

Id. at 36. (Emphasis supplied).

It is thus clear that Ms. Seymour was of the view that her children had their own independent, substantial claims, and, although they were not being asserted "in a lawsuit" "at this time," the specter of future litigation by the children loomed like a brooding omnipresence. From any prudent perspective, a settlement with Ms. Seymour had to include the children's unpled claims. That, at least, was the defendants' non-negotiable position.

B. The Early Settlement Negotiations

The unpled claims of Ms. Seymour's children remained a central issue as the settlement negotiations continued into early 2005. On March 11, 2005, Mark Howard, counsel for the realtor defendants, emailed the terms of defendants' settlement offer to William Caruso, one of Ms. Seymour's counsel. (*Defendants' Br.* Ex. D1). The first two of five terms predictably dealt with the children's claims:

> 1) Plaintiff to amend complaint to include minors' claims prior to dismissal pursuant to settlement, and to petition [Magistrate Judge] Levin in accordance [with] N.Y. state law Chapter 308, section 1207 (reproduced below) *and allocate a reasonable amount to the minor's [sic] claims*, and in the event Levin declines to exercise jurisdiction, then plaintiff will institute a special proceeding in NY;
>
> 2) $37,500 total offer divided among the plaintiff and her children in the manner approved by the appropriate court, inclusive of any and all attorneys fees and costs . . .

Id. (Parenthesis in original). Mr. Howard sent along a copy of §1207 of the New York Civil Practice Law and Rules, adding emphasis to the portions he believed pertinent:

> 1207. Settlement of action or claim by infant, judicially declared incompetent or conservatee, by whom motion made; special proceeding; notice; order of settlement. **Upon motion of a guardian of the property** or guardian ad litem of an infant or, **if there is no such guardian, then of a parent having legal custody of an infant,** or if there is no such parent, by another person having legal custody, or if the infant is married, by an adult spouse residing with the infant, or of the committee of the property

> of a person judicially declared to be incompetent, or of the conservator of the property of a conservatee, **the court may order settlement of any action commenced by or on behalf of the infant**, incompetent or conservatee. **If no action has been commenced, a special proceeding may be commenced upon petition of such a representative for settlement of any claim by the infant, incompetent or conservatee in any court where an action for the amount of the proposed settlement could have been commenced.**

Id. (Boldface added by Mr. Howard, underlining in §1207). Acknowledging the offer on March 13, 2005, Mr. Caruso indicated that he still had not received approval from Ms. Seymour, but that he would be speaking with her that day. Mr. Caruso told Mr. Howard that he thought "it [the final settlement figure] will go at $40,000." (*Defendants' Br.* Ex. D2).

On March 14, 2005, Mr. Howard spoke with Leslie Matlaw, Ms. Seymour's co-counsel, regarding settlement negotiations and the defendants' March 11 offer. As a follow-up to their conversation, Mr. Howard faxed to Ms. Matlaw a two-page letter that set forth the defendants' "offer" to settle. (*Defendants' Br.* Ex. D3). The letter stressed that "all our offers have included court approval of the minor's [sic] claims," and explained that, after his review of New York law, he believed it was necessary to have the matter approved by the court, and cited, *in haec verba*, the relevant New York statute and provided case authority to support his interpretation. *Id.* Following his lengthy and reasoned explanation of why approval of settlement of the minors' claims was legally required and the *sine qua non* of any settlement agreement, Mr. Howard enumerated the five conditions for settlement:

> (1) Plaintiff to amend complaint to include minors' claims prior to dismissal pursuant to settlement, and to petition [Magistrate Judge] Levin in accordance

[with] N.Y. state law Chapter 308, section 1207, *and allocate a reasonable amount to the minor's [sic] claims*, and in the event [Magistrate Judge] Levin declines to exercise jurisdiction, then plaintiff with institute a special proceeding in NY;

(2) $40,000 *total offer divided among the plaintiff and her children in the manner approved by the appropriate court*, inclusive of any and all attorneys fees and costs; In the event that Judge Levin declines jurisdiction over the approval process, we will pay an additional $1,000.00 to defray costs of the approval process in New York.

(3) Plaintiff's acknowledgment in the release that the defendants claim that the settlement is of a disputed claim, and made solely to avoid litigation and that liability is denied.

(4) Confidentiality as to all terms and conditions of settlement, by all parties and counsel;

(5) A release of all claims for legal or equitable relief to be drafted by defendants for execution by plaintiffs, incorporating the above terms.

Id. (Emphasis supplied).

That same day, Ms. Matlaw responded to this letter. (*Defendants' Br.* Ex. D4). First, she summarized her conversation with Mr. Howard that morning, conveying "Ms. Seymour's counter-offer to settle ... for a Confidential $45,000 total offer (or $40,000 with a Gag Order) *and her acceptance of all other terms set forth in your fax* other than the filing of a [separate] New York action in relation to her children's

claims." *Id.* (Emphasis supplied). [5] Ms. Matlaw further reported that she was "very pleased to report that Ms. Seymour has **accepted** a total offer of $40,000 for all Defendants and will accept the Confidentiality Provision in Full and Final Settlement of all claims with no Defendant acknowledgment of liability." (Boldface by Ms. Matlaw). According to Ms. Matlaw, Ms. Seymour was prepared to execute the defendants' release "subject to our review and approval." *Id.*

Ms. Matlaw went on to explain why a new action in New York would not be needed:

> Ms. Seymour is both Devin and Peter Madkin's parent and their Guardian pursuant to an *already-existing Minors' Estate in New York Surrogates' [sic] Court.* Thus, rather than filing a *separate* lawsuit which would show up in a litigation search contrary to Ms. Seymour's wishes, we should be able to get the necessary judicial approval by simply petitioning the New York judge for approval of our Agreed Consent Order.

Id. (Emphasis supplied). Upon considering the relevant procedure and costs, Ms. Matlaw informed Mr. Howard that Defendants' offer of $1,000 toward "the costs of judicial approval of the minors' claims" was more than adequate. *Id.* In closing, Ms. Matlaw expressed her belief that "we can resolve all outstanding issues and develop agreed-upon language in the very near future" and that she was "prepared to report to Judge Levin [the following] Wednesday morning that we have settled this case in principle, that Plaintiffs are preparing an Amended Complaint and Draft Agreed Consent Order for production to Defendants, and that we anticipate presenting these for Judge Levin's approval by the end of the month." *Id.*

FN5. Attached to Ms. Matlaw's March 14th letter was Mr. Howard's earlier letter that day. (*See* Ex. D4).

Additional discussions ensued and, later that day, Mr. Howard sent an email to Ms. Matlaw and Mr. Caruso expressing his agreement that "we do not need to amend the complaint if you are going to get the New York court to approve the settlement." (*Defendants' Br.* Ex. D5). Mr. Howard included a draft affidavit on which he had been working for Ms. Seymour's approval of settlement that he felt comported with the requirements of New York law, CPLR §1208. Paragraphs 4 and 5 of the draft affidavit made clear that the children had their own claims that the Surrogate's Court was to consider:

> 4. Plaintiff has claimed that the children's expectations were disappointed when they were unable to obtain a home, and general emotional damages have been claimed. There are no related medical or psychological treatments or bills that have been incurred on be half of either minor child.
>
> 5. For all claims, defendants have proposed a settlement in the total amount of $40,000, $30,000 payable to Donna Seymour to resolve her claims and $5,000 each payable to the estates of Peter Madkin and Devin Madkin. The minors settlement amounts will be reduced by application of a 1/3 attorney fee, resulting in a net payment to each of 3,333.33, which I will hold for them ... until the respective minor child reaches the age of majority.

Id. Replying to Mr. Howard via email later that evening, Ms. Matlaw said she agreed that they need not amend the complaint, but simply proceed directly to petition the Surrogate's Court, which was overseeing the "already-existing Minors' Estate" for approval of the settlement and release of their claims. (*Defendants' Br.* Ex. D6). She also reported that she spoke in detail with a clerk in the New York Surrogate's

Court and learned that the court could rule in approximately two weeks based upon a statement as to the "nature of the action [and] why it is fair and in the wards' best interests." (*Defendants' Br.* Ex. D6). Ms. Matlaw also indicated some confusion over whether she could represent the children in New York or whether Seymour will proceed *pro se*. *Id.* She concluded with an assurance that "[w]e'll straighten it all out and make sure that a *proper* New York Petition is on file by the end of the week so that the Order approving the Settlement of the minors' claims can be part of the Petition before Judge Levin." (Emphasis supplied).

Thus, by the end of the day on March 14, 2005, it is clear that the parties had agreed to the following:

1. Ms. Seymour was to be paid $40,000 in full and final settlement of all claims;
2. She was to allocate a reasoable amount of this sum to her children's claims in the manner approved by the appropriate court;
3. The settlement was to be confidential;
4. There would be a denial of liability by the defendants;
5. The plaintiff would seek approval from the Surrogate's Court in New York of the settlement agreement and the release of the children's claims;
6. The defendants would pay $1,000 to defray the costs of the approval process in New York if New York counsel were used.

That Ms. Matlaw had agreed on behalf of her client that some portion of the $40,000 was to be allocated to the children is reenforced by the events of March 22, 2005. That day, Mr. Howard followed up with both Ms. Matlaw and Mr. Caruso to request projections on the timing of the Surrogate's Court's approval. (*Defendants' Br.* Ex. D8). On March 24, 2005, Ms. Matlaw replied that she needed an approved settle-

ment agreement as an exhibit to support the petition that would be filed in New York. *Id.* Just a few minutes later, Mr. Howard replied via email and asked Ms. Matlaw to provide "the allocations that you will propose to the court for the children" and indicated that he would amend the draft after approval from defendants' other counsel. *Id.* The next day, March 25, 2005, Ms. Matlaw replied that "[w]e envisioned a pro-rata breakdown similar to that found in the damages statement we provided following our in-chambers discussion with Judge Levin. We've conveyed proposed amounts to [Seymour], but have yet to hear back from her." *Id.* She then asked for the current draft of the agreement so she could review the other terms and "fill in the blanks" once Ms. Seymour had decided on the breakdown. *Id.* [6]

Thus, by March 25th, the only open issue was the amount Ms. Seymour would allocate to the children. That there was to be an allocation in some amount was agreed upon. On March 29, 2005, Mr. Howard sent the proposed draft release and settlement agreement (the "March 29 Version") and asked both Mr. Caruso and Ms. Matlaw to review and indicate whether it was acceptable. (*Defendants' Br.* Ex. D9). Consistent with all the parties' prior exchanges, the formal written agreement envisioned some payment to the minors and court approval of the settlement. Thus, paragraph b. provided: Donna Seymour agrees to obtain approval of the proposed settlement of the claims of the minor children named Peter Madkin and Devin Madkin from a court in New York state where the children reside, and provide a copy of the order authorizing the settlement and directing the amounts to

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FN6. Presumably, the pro-rata breakdown would be $5,000 to each of the children. This amount is 25% of $40,000 which bears the same ratio that the $50,000 settlement demand bore to the $200,000 total originally demanded by Ms. Seymour on August 31, 2004.

be paid to the minors' estates [7].

The next day, March 30th, Ms. Seymour had a change of heart and sent this email to Ms. Matlaw:

> I received your fax. There is no aplit [sic] concerning Peter and Devin. I am the one whohas[sic] gone in to [sic] debt and should be reimbursed. I will not ettle [sic] if any of this money is going in to [sic] their trusts and not to me.

(*Brief in Support of Plaintiff's Motion To Enforce Settlement* ("*Pl.Br.*") Ex. D). Ms. Seymour's lawyers never told defense counsel of this email or Ms. Seymour's position. Instead, they embarked on what the evidence compellingly suggests is a pattern of deception designed to gull not only the defendants' lawyers, but the Surrogate's Court in New York as well.

In her brief, plaintiff calls the March 30th fax an "unequivocal rejection" of designating any part of the settlement to her children's trusts. (*Pl. Br.*, at 2). Perhaps it was. The difficulty is that Ms. Seymour's lawyers chose to conceal it from the defendants until the briefing on the present motions, and Ms. Seymour's undisclosed rejection - whether unequivocal or not - is thus analytically meaningless. *See infra* at 25.

FN7. Paragraph i. provided that the realtor defendants would contribute up to an additional $1,000 toward attorney's fees and expenses payable to New York counsel for time and expenses directly incurred in connection with obtaining New York Court approval for the minor's settlements. Paragraph k. provided for indemnification under certain circumstances and paragraph h. contained a confidentiality provision.

C. The Plaintiff's Lawyers Changes to the Language Regarding the Children's Claims Following the Receipt of Ms. Seymour's Email of March 30th

If it be true that honesty of purpose prompts frankness of statement, *Crosby v. Buchanan*, 90 U.S. 420, 454 (1874), the post-March 30th conduct of Ms. Seymour's lawyers does not fare well. Rather than tell defense counsel of Seymour's *volte face*, Mr. Caruso acted as if nothing had occurred and that everything was on track in accordance with the March 14th exchange of emails. On March 31, 2005, he was "revising the settlement agreement and preparing materials to obtain release of claims by minors." (*Defendants' Br.* Ex. D9). On April 1, 2005, Mr. Howard was sent a revised draft of the settlement agreement for his review. The covering email stated:

> We believe the key factors are 1) the releases should be joint and mutual, and 2) Paragraph K in your draft [the Indemnity Paragraph] was stricken because the New York court order will obviate the need for that paragraph. *We made other minor changes, which did not amount to any substantive changes.*

(*Defendants' Br.* Ex. D10) (Emphasis supplied).

Among the purportedly "minor" "[non-] "substantive changes" was a change to what had been Paragraph b. (but now was redesignated as Paragraph c.). In Mr. Howard's March 29th draft, Paragraph c. provided:

> Donna Seymour has obtained approval of the proposed settlement of the claims of the minor children named Peter Madkin and Devin Madkin from a court in New York state where the children reside, and provided a copy of the order authorizing the settlement and directing the amounts to be paid to the minors' estates.

(*Defendants'* Ex. 1). [8]

In the April 1st version, as changed by Ms. Seymour's lawyers following her March 30th email, the critical phrase, "of the claims of the minor children named Peter Madkin and Devin Madkin from a court in New York state where the children reside, and provided a copy of the order authorizing the settlement and directing the amounts to be paid to the minors' estates" was deleted.[9] Mr. Howard, "supposing he was

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FN8. It is undisputed that Paragraph c. as drafted by Mr. Howard, contained this language. (*Plaintiff's Response to Defendants Joint Brief in Support of Their Cross-Motion to Settlement [sic]*, at 1-2).

FN9. Although the plaintiff maintains that the defendants "themselves excised this language from the final draft presented for plaintiff's approval," (*Amended Brief in Support of Plaintiff's motion to Enforce Settlement*, at 2), the defendants deny it, and the evidence and common sense support the defendants' version of events. From the beginning, it was the defendants' view that the release of the children's claims had to be supported by consideration and thus there had to be some allocation of the settlement amount to them. There is simply no basis to conclude that they would have suddenly had a change of heart and unilaterally excised language that was critical to their view of New York law and that no one had objected to. Moreover, pursuant to my order of September 30, 2005, I have been provided with a copy of the plaintiff's April 1st revisions to Mr. Howard's March 29th draft. It is plain that the plaintiff, not the defendants, excised the language quoted above, and then tendentiously characterized it as one of the "minor," non-substantive changes they made. Beyond this, a review of the exhibits and the word-track functions on the documents attached to the parties' briefs makes clear that it was the plaintiff's lawyers who were responsible for the deletion of the language. *See generally* Defendants' Joint Reply in Opposition to Plaintiff's Motion to Enforce Settlement, at 5; Defendants' Brief Ex. D10 and Ex. 3 to Defendants' Joint Reply in Opposition to Plaintiff's Motion and D22 to Defendants' Opening Brief.

dealing with ... honorable [people] ... of high-standing at the bar, whose professional robe indicated the higher virtues," considered he was secure in relying on the assurance that the deletion in Paragraph c. was minor and not at all substantive. *Dickerman v. Burgess*, 20 Ill. 266 (Ill. 1858).

D. The Aftermath

The remaining correspondence between the parties focused on the settlement agreement's confidentiality provision, with no further mention of the children's claims. On April 28, 2005, Mr. Howard sent a revised draft of the proposed settlement agreement and documents stipulating to the dismissal of the case. (*Defendants' Br.* Ex. D22). Paragraph c. incorporated the purportedly minor non-substantive change and Paragraph j. provided that the defendants would pay $1,000 to New York counsel for time and expenses incurred in obtaining New York approval for the terms of the settlement. In the email accompanying this version, Mr. Howard asked: "Please review, and answer the eternal question - Are we there yet?" (*Defendants' Br.* Ex. D22). According to the plaintiff, the manner in which defendants presented the April 28 version left no reason to believe that it was anything other than the final language for which the defendants sought the plaintiff's assent. (*Amended Brief in Support of Plaintiff's Motion to Enforce Settlement*, at 3; *Plaintiff's Response to Defendants' Joint Brief*, at 2-3).

The course Ms. Seymour's lawyers pursued after receiving this email mirrored the course they pursued after receiving Ms. Seymour's March 30th email. Just as they did not tell Mr. Howard and his colleagues that on March 30th Ms. Seymour had refused to go along with any allocation, they did not tell Mr. Howard that they were going to take the draft agreement to New York, that they would make it appear that the children had absolutely no claims, or that they would make another change to the language of Paragraph c. Indeed, there was no

further communication between the parties until May 23, 2005. And even then the information provided to the defendants was misleading.

E. The Proceedings in the Surrogate's Court in New York

On May 20, 2005, unbeknownst to defendants, Ms. Seymour petitioned the Saratoga County Surrogate's Court in New York State to approve the settlement agreement, which only she had signed and which her lawyers had surreptitiously altered. (*Defendants' Br.* Exs. F1, F2). Ms. Seymour filed two identical petitions in the Surrogate's Court, one on behalf of Devin and one on behalf of Peter. The petitions presented a misleading picture of the claims of her children and their importance to the agreed upon settlement of her Fair Housing Act claim in the Northern District of Illinois.

Under New York law, it was absolutely critical that the "best interests" of the children be protected, and to do that the Surrogate's Court had to be "fully apprised" of all of the critical facts. *See* New York Civil Practice Law and Rules. §§1207-1208. *Cf. Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 520 (1924) (Brandeis, J., dissenting) ("Knowledge is essential to understanding, and understanding should precede judging."). The importance of absolute candor with the New York court was essential in light of the non-adversarial nature of the proceedings. [**10**]

FN10. Just as "skill of counsel, where found on one side only, terrifyingly weights the scales of judgment," Llewellyn, The Common Law Tradition: Deciding Appeals 31 (1960), so too do deceptive presentations in a non-adversarial setting. In that context, the need for absolute candor is perhaps greater since there is no one to challenge the presentation. Thus, rules of ethics as they pertain to lawyers require disclosure to the tribunal in an *ex parte* proceeding of "all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse." Rule 3.3(d), Illinois Supreme Court Rules of Professional Conduct.

The presentation to the Surrogate's Court by Ms. Seymour through her petitions was not designed to "fully apprise" the Court as New York law required. For example, the petitions did not reveal that Ms. Seymour's claim involved the attempted purchase of a home, only that "property" was involved, that she was in the active business of investing and dealing in real estate, and that the damages sought included "the loss of commissions, business, and business opportunity because of discrimination against her...." (*Defendants* Ex.F1). The Court was thus led to believe that Ms. Seymour's business interests only were implicated. Concealed was the fact that, according to Ms. Seymour, she was forced to relocate her entire family as a consequence of the defendants' discrimination against her and her children.

But this was fairly subtle, and so the petitions stressed that only Ms. Seymour was affected by the defendants' misconduct and only she had a claim, which she had decided to settle for $40,000, to avoid the cost, delay, uncertainty, and burden of further litigation in Illinois. (*Defendants' Br.* Exs. F1-F2, at ¶4). The petition relating to Devin alleged:

> In the federal complaint, there is no mention of Devin Madkin, who is the child of Petitioner. She was not named in the complaint, no claim was made on her behalf, and *defendants* have not claimed that there is evidence of any damages for or liability to Devin Madkin.

(Emphasis supplied). The petition relating to Peter is identical except for his name and gender reference.

Of course the "defendants" had not claimed there were any damages to the children. They had denied liability. Ms. Seymour, however, had insisted that her children had been profoundly affected by all that occurred. It was manifestly false to say that the defendants "did no discovery regarding

the existence of any possible interest of any minor child" and that "there were no allegations or claims to that effect." (*Defendants' Br.* Ex. F1, at ¶8; *Defendants' Br.* Ex. F2, at ¶8). The petitions were careful to make no mention of the pleadings' insistence that the defendants had "caused her and her family, economic injury, consequential damages, and economic harm" or that she had sought compensatory and punitive damages "for discrimination against her *and her children* ...." (*2nd Amended Complaint*, ¶111; Prayer for Relief (d); ¶114; Prayer for Relief(d); ¶116; Prayer for Relief (d); ¶118 (Emphasis supplied)). Nor did they reveal that Ms. Seymour had originally asked for $25,000 each for her children in one of her settlement demanded, that she repeatedly referred to the alleged discrimination's effect on the children during her deposition, or that she had claimed at her deposition that her "children's lives have been *forever altered* as a result of this lawsuit, which was us having to relocate across the country. I have not chosen *at this time* to file a lawsuit on their behalf." In short, the petitions could scarcely have been more misleading as they related to the existence of claims by Ms. Seymour's children and the importance the release of those unpled claims played in the settlement discussions.

Ms. Seymour asked the New York Court to approve the settlement agreement and "specifically find that Devin Madkin has no interest in such settlement and such order shall be a waiver, release, and satisfaction of all claims Devin Madkin had, has or may have against any" of the Defendants. (*Defendants' Br.* Ex. F1, at ¶11). She made an identical request with respect to Peter Madkin. (*Defendants' Br.* Ex. F2, at ¶11). As a result, the Surrogate's Court, thinking itself "fully advised in the premises," ordered the settlement "approved as being in the Ward's best interest" and ordered that the executed settlement be filed with the court within 30 days of execution and entry of the Agreed Consent Decree. (*Defendants' Br.* Exs. E1, E2).

The settlement agreement presented by Ms. Seymour to the New York Court and attached to its order was, essentially, the April 28 version, with one change, made by the plaintiff's lawyers without the knowledge or approval of defense counsel: the phrase in Paragraph c., "Miss Donna Seymour has obtained approval of the proposed settlement of *the* claims of the minor children," was changed to "Donna Seymour has obtained approval of the proposed settlement of *any* claims of the minor children." (Emphasis supplied). The document was signed by Ms. Seymour and notarized on May 20, 2005.

"Of course, the [change] ... would not have been [made] unless it had been intended to have some effect, and we do not see what effect it could be expected to have" upon Judge Seibert of the Surrogate's Court "except to influence him" that the children had no claims. *Schenck v. United States*, 249 U.S. 47, 48 (1919) (Holmes, J.). *Cf. United States v. Ladish Malting Co.*, 135 F.3d 484, 490 (7th Cir. 1998) ("The prosecutor must have thought that the instruction mattered; why else so vigorously oppose Ladish's request for an actual-knowledge instruction"). The intended effect seems obvious: the phrase "the claims of the minor children" connotes the existence of actual concrete claims, while the phrase, "any claims of the minor children," suggests the kind of hypothetical, non-existent claims that are often the subject of releases because of lawyers' excessive (but quite proper) caution.

In deciding whether a release of claims where the minors receive nothing is in the minor's "best interests," a court would certainly have wanted to know whether actual or theoretical claims were involved. The petitions presented to Judge Seibert left no doubt that only Ms. Seymour had been harmed, and that the children had no real basis for complaint. On May 20th, the Surrogate's Court entered its approval orders. (*Defendants' Br.*, Ex. E1, E2). Neither the application to nor the approval of the New York court was communicated to defense counsel.

F. The Parties' Report to This Court and the Subsequent Dispute

On May 23, 2005, the parties re-initiated communications via email regarding the preparation of a joint status report. Mr. Caruso indicated that he could get the report prepared, and he said that he believed the parties had reached an agreement "subject only to the defendants' requirement of protection from any action by a child when they reach maturity." (*Defendants' Br.*, Ex. D24). The email made no mention of Judge Seibert's May 20th order. On May 24th, the parties filed a Joint Status Report summarizing, *inter alia*, the status of settlement negotiations:

> The parties have agreed in principle to a settlement of all claims. A condition of the settlement is that plaintiff must seek approval from the state courts of New York, the state of residence of plaintiff and her children, of the settlement in order to procure a *valid* release of any potential claims of her minor children.

(*Defendants' Br.* Ex. G) (Emphasis supplied). Apparently, the defendants still had not been informed of the New York court's approval of the settlement. (*Amended Brief in Support of Plaintiff's Motion to Enforce Settlement*, at 4; *Defendants' Joint Reply in Opposition to Plaintiff's Motion*, at 7).

On June 20th, Mr. Howard, in an email to counsel for both parties, noted that the release approved in New York was not the version with the confidentiality language last approved. (*Defendants' Br.* Ex. D27). Ms. Donaldson, in particular was dismayed by the confidentiality language, and indicated via email on June 21, 2005, that "no one at [her firm], counsel for the 'owner' defendants, had finally approved or consented to the language in the draft release attached to the orders. This oversight needs to be corrected." (*Defendants' Br.* Ex.

D29). Mr. Caruso responded, informing Ms. Donaldson that he was under the impression that she had approved the language before he sent the agreement to New York for approval. (*Defendants' Br.* Ex. D30). Later that day, after speaking with her clients, Ms. Donaldson indicated acceptance of the Release already approved by the New York Court, but requested a copy of the petitions that were filed in New York. *Id.*

Despite a further exchange of emails, Ms. Donaldson, as of June 27th, still had not received the copies she had requested. Also, at that point, having finally learned of the presentation by Ms. Seymour to the Surrogate's Court, Ms. Donaldson sent an email to plaintiff's counsel complaining of what she deemed to be a breach of the settlement agreement:

> As addressed in the Release, the purpose of involving the New York court was to obtain 'approval of the proposed settlement of any claims of the minor children.' And, as noted in the Joint Status Report, 'to procure a *valid* release of any potential claims of [the] minor children.' *The Petitions allegedly presented to the court do not comport with this purpose.* The Petitions ask for a finding that the children have NO interest in the settlement and assert that the petitioner has settled HER claim for $40,000. If this is so, then the Petitions would need to unequivocally concede that the children are without claims and were not injured by the alleged 'wrong' in order to be in compliance with the terms and conditions of the settlement. The Petitions are silent on this point, and instead, speak to an assertion that any claims of the minors were not part of the underlying litigation and therefore the minors have no interest in the settlement fund. *As such, the plaintiff is in breach of the agreement as she has not 'obtained approval of the proposed settlement of any claims of the minor children ....*

(*Defendants' Br.* Ex. D32) (Emphasis supplied). Ms. Donaldson described what she viewed as "several false and wholly unsupported statements set forth in the draft Petitions" and insisted that the certain representations made by Ms. Seymour were "patently false." *Id.*

On June 28, 2005, Mr. Howard amplified these concerns. He argued that the Surrogate's Court's order was obtained on incomplete information, which prompted the defendants' concern that the release, entered into on behalf of the minor children, could be subject to attack for, under New York law, orders of the Surrogate's Court obtained by fraud or mistake. *Id.* He explained that he "would still like to see the settlement go through," and suggested that Ms. Seymour try again in New York, offering an additional $1,000 "to be payable to a New York attorney for prospective work on straightening this out." (*Defendants' Br.* Ex. D35). Not surprisingly, given what had occurred, Mr. Caruso responded that he "disagree[d] with [Mr. Howard's] interpretation of the settlement" and notified Mr. Howard of this pending motion to enforce the settlement. (*Defendants' Br.*, Ex. D36).

G. The Parties' Contentions in this Court

The parties are united in insisting that there is a binding settlement agreement (*Motion to Enforce Settlement Agreement*, at 1; *Joint Brief in Support of Defendants' Motion to Enforce Settlement*, at 1). Their dispute focuses on the terms of that agreement and when it was reached. According to the plaintiff, the settlement agreement is the April 28th version, and all that it required was that she obtain approval of the proposed settlement of any claims of her minor children and provide a copy of the order authorizing the settlement from the Surrogate's Court. Having done that, says she, that is the end of the matter, and the defendants owe her $40,000.

The defendants have a very different view. They submit that the material and essential terms of the parties' agreement are contained in the written email exchanges, which constitute a binding settlement agreement, which came into being on March 14th. They contend that Ms. Seymour was required to allocate some portion of the $40,000 to her children and without such an allocation, the release is without consideration and thus not binding. In addition, Ms. Seymour had to comply with New York law and to fully apprise the court of the children's claims in order for any release to be valid. They argue, persuasively, that Ms. Seymour's presentation did not comply with New York law in that it was underinclusive and deceptive. For the defendants, the April 28th version was not the settlement agreement, but merely a "draft Release." (*Defendants' Joint Reply in Opposition to Plaintiffs' Motion*, at 8). The plaintiff summarily dismisses these concerns, arguing that she was completely candid with the New York court, and that the releases are valid. In any event, she argues that the defendants are protected from future litigation by the children because the statute of limitations on Fair Housing Act claims has run.

II. ANALYSIS

A. The Parties Reached an Enforceable Settlement Agreement on March 14, 2005

Settlement agreements are contracts, and their construction and enforcement are governed by principles of local law applicable to contracts generally. *Laserage Tech. Corp. v. Laserage Laboratories Inc.*, 972 F.2d 799, 802 (7th Cir. 1992); *McCall-Bey v. Franzen*, 777 F.2d 1178, 1186 (7th Cir.1985). Under Illinois contract law " 'the primary object in construing a contract is to give effect to the intention of the parties involved.' " *In re Doyle*, 144 Ill.2d 451, 468, 581 N.E.2d 669 (1991). An agreement is binding if the parties

agree on all material terms. *Abbott Laboratories v. Alpha Therapeutic Corp.*, 164 F.3d 385, 387 (7th Cir. 1999); *Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 118 Ill.2d 306, 313-314, 515 N.E.2d 61 (1987). Whether the parties came to agreement is determined not by their subjective intent, but by what they expressed to each other in their writings. *Abbott*, 164 F.3d at 387. Thus, the parties decide for themselves whether the results of preliminary negotiations bind them, but they do so through their words. *Id.* at 388; *see also Empro Mfg. Co. v. Ball-Co Mfg., Inc.*, 870 F.2d 423, 425 (7th Cir. 1989) (*citing Chicago Inv. Corp. v. Dolins*, 107 Ill.2d 120, 481 N.E.2d 712 (1985)). **[11]**

Unless parties expressly condition their agreement on the signing of a formal document, informal writings manifesting each party's intent to be bound by the material terms proposed constitute a binding settlement agreement. *Abbott*, 164 F.3d at 388-89; *see also Empro*, 870 F.2d at 425. A contract is sufficiently definite and enforceable as long as the court can, under proper rules of construction and applicable principles of equity, ascertain what the parties have agreed to. *Academy Chicago Publishers v. Cheever*, 144 Ill.2d 24, 29, 578 N.E.2d 981 (1991); *see also Dawson*, 977 F.2d at 373. There is no requirement that an agreement be "signed, sealed, and delivered" to be binding, *Abbott*, 164 F.3d at 389, and Illinois courts have not been shy about enforcing promises made in the context of ongoing negotiations and often involving preliminary or incomplete agreements. *Dawson v. General Motors Corp.*, 977 F.2d 369, 374 (7th Cir. 1992). Phrased differently, a contract is enforceable even though some terms may be missing or left to be agreed upon by the parties. *Academy Chicago Publishers*, 144 Ill.2d at 30, 578 N.E.2d 981; *see also Johnson v. Jung*, Nos. 02 C 5221, 04 C

FN11. New York law is in accord. *Flores v. The Lower East Side Service Center, Inc.*, 4 N.Y.2d 363, 828 N.E.2d 593 (2005).

6158, 2005 WL 1126897, at *3 (N.D.Ill. May 4, 2005); *Rose v. Mavrakis*, 343 Ill.App.3d 1086, 1090-91, 799 N.E.2d 469 (2003).

Application of these fundamental principles leads to the conclusion that by virtue of the exchange of emails, a binding contract arose on March 14, 2005. (*Defendants' Joint Reply in Opposition to Plaintiff's Motion*, at 10-11). By the end of the day, the parties had agreed to all the material terms and conditions of the contract, including:

1. Ms. Seymour was to be paid $40,000 in full and final settlement of all claims;
2. She was to allocate a reasonable amount of this sum to her children's claims in the manner approved by the appropriate court;
3. The settlement was to be confidential;
4. There would be a denial of liability by the defendants;
5. The plaintiff would seek approval from the Surrogate's Court in New York of the settlement agreement and the release of the children's claims;
6. The defendants would pay $1,000 to defray the costs of the approval process in New York if New York counsel were used.

It is no answer to say that Ms. Seymour's March 30th email to her lawyers was an "unequivocal rejection" of the allocation provision - a provision she had accepted two weeks earlier through her lawyers. Under basic principles of agency, that approval bound her. *Knisley v. City of Jacksonville*, 147 Ill.App.3d 116, 120, 497 N.E.2d 883 (1986); *In re Marriage of Clarke*, 194 Ill.App.3d 248, 252, 550 N.E.2d 1220 (1990) (attorney's statements may bind the client to a settlement agreement even when the client later claims to have misunderstood the terms of the settlement). In addition to coming too late, Ms. Seymour's "rejection" was never communicated

to the defendants, and a secret, undisclosed "mental reservation" on the part of one party to a settlement agreement is ineffectual. *See Steinberg v. Chicago Medical School*, 69 Ill.2d 320, 330-331 (1977), citing 1 Williston, Contracts, §22, at 46-48 (3d. ed. 1957); *American College of Surgeons v. Lumbermens Mut. Casualty Co.*, 142 Ill.App.3d 680, 693-694 (1st Dist. 1986). "[P]rivate intent counts only if it is conveyed to the other party and shared." *Robbins v. Lynch*, 836 F.2d 330 (7th Cir. 1988).

The Plaintiff Breached the March Agreement By Failing to Make Any Allocation of the Settlement Amount to Her Children and By Misleading The Surrogate's Court About the Existence and Nature of Her Childrens' Claims

Unwilling to accept a release that in their view might be subject to attack on the ground that it lacked consideration, the defendants, from the beginning, insisted that there be some allocation of the $40,000 to the children. Ms. Seymour had "accept[ed]" this provision through Ms. Matlaw's March 14th email. Of course, the Surrogate's Court was free not to approve the release and settlement if it concluded that the allocation was not in the childrens' "best interests." If that occurred, there would be no settlement, but the plaintiff would have performed under the agreement. Ms. Seymour was not, however, free to eliminate her obligation to make an allocation or at least to allow the Surrogate's Court to do so.

To ensure that there would be no allocation to her children, Ms. Seymour's petitions to the Surrogate's Court were drafted in such a way that they neither adequately nor accurately informed Judge Seibert of the Surrogate's Court of the information statutorily required be included in the petitions. Without that information, he could not make an informed judgment about whether the settlement agreement was in the childrens' "best interest," as required by §§1207-1208 of New

York's Civil Practice Law and Rules. In order to make that discretionary judgment, *id.*, Judge Seibert manifestly, had to be "fully advised" of the relevant facts. *See Edionwe v. Hussain*, 777 N.Y.S.2d 520, 522 (2d Dept. 2004). Not only did the petitions not "fully advise" the Court, they badly misled him.

Section 1208(a) provides the procedures that *must* be followed and the information that must be provided by affidavit when petitioning the Surrogate's Court for approval of a settlement affecting a minor or incompetent:

1. name, residence and relationship to the infant;
2. name, age and residence of the infant;
3. the circumstances giving rise to the action or claim [of the infant];
4. the nature and extent of the damages sustained by the infant;
5. the terms and proposed distribution of the settlement and his approval of both;
6. the facts surrounding any other motion or petition for settlement of the same claim, of an action to recover on the same claim or of the same action;
7. whether reimbursement for medical or other expenses has been received from any source; and
8. whether the infant's representative or any member of the infant's family has made a claim for damages alleged to have been suffered as a result of the same occurrence giving rise to the infant's claim and, if so, the amount paid or to be paid in settlement of such claim or if such claim has not been settled the reasons therefore. [**12**]

FN12. The plaintiff's lawyers were aware of §1208 through Mr. Howard's March 14, 2005 email. (*Def. Br.*, Exs. D5, D6). Mr. Howard went so far as to provide a draft affidavit, which accurately portrayed plaintiff's Fair Housing Act claim as it related to her children and made specific reference to an allocation to the children. (*Id.* at ¶¶4-5).

Without such information, the Court could not fulfill its duty of "scrutinizing" the proposed settlement "to assure that it was fair and reasonable and in the infant plaintiff's best interests." *Edionwe,* 777 N.Y.S.2d at 522. Unless the requirements of §§1207 and 1208 are complied with, the approval is subject to collateral attack. *Ferraro v. Stripekis,* 401 N.Y.S.2d 252 (2d Dept. 1978); *Caglioti v. Medi-Cab, Inc.,* 382 N.Y.S.2d 311 (1st Dept. 1976); Valdimer v. Mount Vernon Hebrew Camps, Inc., 195 N.Y.S.2d 24, *aff'd,* 210 N.Y.S.2d 520 (N.Y. 1961). [**13**] A settlement approval might also be set aside on substantive grounds such as fraud, duress or mistake. *Fletcher v. Hatch,* 602 N.Y.S.2d 718, 719-20 (N.Y.A.D. 3d Dept. 1993). [**14**]

Ms. Seymour's petitions did not fully advise the court of the nature of the minors' claims, the circumstances giving rise to those claims, and the nature and extent of the damages purportedly sustained by them. All they did was to explain *Ms. Seymour's claims,* thereby defeating the whole purpose of the exercise. Thus, Ms. Seymour's petitions stated:

> By her complaint, that alleged discrimination, Petitioner sought damages. The damages sought included the loss of commissions, business, and business opportunity because of discrimination against her. The

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FN13. The plaintiff's attempt to distinguish these cases on the basis that the minor was a named plaintiff in the underlying litigation ignores the unambiguous text of §1207 which makes clear that the requirements of §1207 have nothing to do with whether there is even a pending action, let alone whether the minor is named in it. By its plain terms, §1207 is applicable even where "no action has been commenced."

FN14. Ms. Seymour's children would be in a position to blame their mother's lawyers for the underinclusive presentation to the Surrogate's Court. Being innocent of any wrongdoing, they would contend that their interests must be protected and the releases set aside.

> amount ... lost that she sought to recover exceeded $90,000.00. Petitioner has decided to settle her claim for a lower amount, $40,000, to avoid the cost, delay, uncertainty, and burden of further litigation in Illinois.

(*Defendants' Br.* Exs. F1-F2, at ¶4). It misses the mark to say that this statement was literally true, for " 'a statement which is technically true as far as it goes may nevertheless be fraudulent, where it is misleading because it does not state matters which materially qualify the statement as made. In other words, a half-truth is sometimes more misleading than an outright lie.' " *St. Joseph Hospital v. Corbetta Construction Co.*, 21 Ill.App.3d 925, 953, 316 N.E.2d 51 (1974). *See also People v. Curry*, 11 A.D.3d 150, 782 N.Y.S.2d 66 (N.Y.A.D. 1st Dept. 2004) ("relating only part of the truth can accomplish a deception as effectively as presenting a complete fabrication."). **[15]**

The second amended complaint alleged no fewer than three times that the defendants discriminated "against [Ms. Seymour] *and her children.*" And there appears no fewer than six times the allegation that both she "*and her family*" are entitled to damages. (*2nd Amended Complaint*, ¶111; Prayer for Relief (d); ¶114; Prayer for Relief (d); ¶116; Prayer for Relief(d); ¶118). Yet, Ms. Seymour's petitions make no mention of any of these allegations. The "misleading omissions" continue in paragraph 7 of the petitions, which state: "there is no mention of" Devin Madkin or Peter Madkin in the "federal complaint." (*Defendants' Br.* Exs. F1-F2, at ¶7). Although the

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FN15. *Cf. Emery v. American General Finance, Inc.* 71 F.3d 1343, 1348 (7th Cir. 1995) (Posner, J.) ("But it is not true that if you are not a fiduciary anything goes, short of false statements. A half truth, or what is usually the same thing a misleading omission, is actionable as fraud."); *Neptuno Treuhand-Und Verwaltungsgesellschaft Mbh v. Arbor*, 295 Ill.App.3d 567, 692 N.E.2d 812, 817 (1998); *Heider v. Leewards Creative Crafts, Inc.*, 245 Ill.App.3d 258, 613 N.E.2d 805, 811 (1993).

federal complaint refers to "her children" or her "family" at least seven times, the plaintiff's lawyers argue that paragraph 7 is not misleading because the second amended complaint does not mention the children "by name." (*Plaintiff's Response to Defendants' Joint Brief in Support of Their Cross-Motion*, at 3-4).

On its face, this argument is preposterous. The only thing about it that "we can commend is the hardihood in supposing [it] could possibly succeed." *United States v. Minneci*, 142 F.2d 428, 429 (2d Cir.1 944) (L. Hand, J.). More than a century ago, Justice Holmes cautioned that "[w]e must think things, not words, or at least we must constantly translate our words into facts for which they stand, if we are to keep to the real and the true." Holmes, *Law and Science and Science and Law*, 12 Harv.L.Rev. 443, 460 (1889). The inescapable reality is that although Ms. Seymour's children were mentioned repeatedly in the pleadings, Judge Seibert was misled into believing that they were strangers to the complaint and thus to the discrimination itself. In short, Ms. Seymour's presentation to the Surrogate's Court did not comply with New York law and constitutes a breach of the settlement agreement. [**16**]

C. The Plaintiff Breached the Terms of the April 28 Version of the Settlement Agreement

The plaintiff contends that there was no settlement agreement until after she assented to Mr. Howard's April 28th version by making application on May 20th to the Surrogate's Court. Even if one were to assume that the April 28th version is the settlement agreement, Ms. Seymour breached it.

FN16. While there was no express mention of compliance with New York law, that compliance was obviously an implied and indispensable term of the agreement. *Sacramento Navigation Co. v. Salz*, 273 U.S. 326, 329 (1927); *Jensen v. Quik International*, 345 Ill.App.3d 713, 715, 801 N.E.2d 1124, 1126 (2003); 11 Williston, Contracts §31.7 at 321 (4th Ed. 1999) (footnotes omitted).

Following Ms. Seymour's March 30th rejection of the allocation provision in the exchange of emails, the plaintiff's lawyers eliminated language in Paragraph c. of the settlement agreement and release relating to the childrens' claims, and then assured the defendants' counsel that the changes were minor and non-substantive. Whether one applies basic principles of estoppel or the fundamental contract principle that acontract is to be construed strictly against the drafter, *Liautaud v. Liautaud*, 221 F.3d 981, 986 (7th Cir. 2000), the result is the same: the parties had agreed that there would be an allocation of some amount in order to satisfy the defendants' analysis of New York law that specific consideration was required to support the release of the minors' claims. Ms. Seymour breached this provision of the settlement agreement by refusing to make an allocation. Thus, the defendants are now subject to the threat of future litigation in which they would have to litigate the validity of the release - the very evil they sought to avoid. [17]

In addition to this change, the plaintiff's lawyers made another, which they did not disclose. They changed the phrase in Paragraph c., "the claims of the minor children," to "any claims of the minor children." Reference to "*the* claims of the minor children" connotes the existence of an extant controversy, not some abstract, theoretical claim which is connoted by the phrase, "*any* claims of the minor children." All this was part of the plaintiff's overarching attempt to obtain an approval of the settlement agreement without allocating any part of the $40,000 to Ms. Seymour's children. Central to that end was failing to inform Judge Seibert about the circumstances surrounding the childrens' claims and the damages she claimed they suffered, as explicitly required by New York law. CPLR §1208.

FN17. Indeed, part of the present motion deals with quarrels over the need for separate consideration. Thus, the defendants are already confronted with an issue they should not have had to face.

According to the petitions, the plaintiff "decided to settle *her* claim for ... $40,000." (*Defendants' Br.* Exs. F1-F2, at ¶4). Further on in the document, the plaintiff requested that the court "approve *the* Settlement Agreement, ... and specifically find that [Devin and Peter] Madkin ha[ve] no interest in such settlement ...." (*Defendants' Br.* Exs. F1-F2, at ¶11). This is not what the April 28th version obligated her to do. Even under the plaintiff's version of the pertinent language, plaintiff was to "obtain[ ] approval of the proposed settlement of *any claims of the minor children named Peter Madkin and Devin Madkin* from a court in New York" - not the approval of her settlement and a declaration that the children have no interest in it. (*Defendants'* Ex. E2). Given the deceptive manner in which plaintiff dealt with the New York court, no court would have hesitated to declare that the children had no real claims and thus no interest in the $40,000 settlement. In short, the approval of the plaintiff's own $40,000 settlement is simply not the same thing as the approval of the settlement of her children's claims, which the court was misled into believing were non-existent. For the reasons discussed earlier, Ms. Seymour's petitions fell far short of "fully advising" Judge Seibert of the nature of the Fair Housing Act claim, the nature of the children's claims and damages. Consequently, they were noncompliant with New York law, and Ms. Seymour has thus breached her contractual duties even as measured by the April 28th version.

Whether a "fully informed decision maker" might have approved the settlement and the release of the minors' claims without any allocation, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 544 (1985), is impossible to know. It is certainly possible that had the argument been made by Ms. Seymour to Judge Seibert that she made to her lawyers in her March 30th email regarding the unfairness of any payment to her children, he would have concluded that it was still in the minors' best interests to approve a release of whatever claims

they had. [18] But Ms. Seymour and her lawyers obviously did not have faith in that position or in how Judge Seibert would react. [19]

D. The Defendants Are Entitled to the Settlement Agreement They Bargained For

Saving the least for last, the plaintiff raises three additional points: the settlement of the children's claims was an insignificant matter; regardless of any impropriety in New York, the defendants are nevertheless adequately protected from any claims by Ms. Seymour's children by the statute of limitations; and finally, the release is valid because, under New York law, it need not be supported by the consideration that would have been provided had Ms. Seymour made the (contractually required) allocation.

FN18. Perhaps payment to Ms. Seymour could also be consideration for the release of the childrens' claims. See Restatement (Second) of Contracts, §71(4) (1981); *General Electric Capital Corp. v. Domino's Pizza, Inc.*, No. 93 C 5070, 1994 WL 256776, *5 (S.D.N.Y. June 2, 1994). But that was not the bargained for consideration, and that theory was never presented to Judge Seibert.

FN19. Neither side has referred to the parol evidence rule - "the rule that if a written contract is 'integrated,' " parol (i.e., extrinsic) evidence, whether oral or written, concerning the negotiations or other background to the contract, including preliminary agreements and understandings, is inadmissible to contradict the apparent meaning of the written contract. *Utica Mut. Ins. Co. v. Vigo Coal Co., Inc.*, 393 F.3d 707, 713-714 (7th Cir. 2004) (Posner, J.). Here, the emails do not vary or contradict the April 28th version. In any event, the parties, by submitting the emails in support of their respective arguments, have waived its application. *Feldman v. Oman Associates, Inc.*, 20 Ill.App.3d 436, 439, 314 N.E.2d 338, 341 (1974).

To say that the issue of the children's claims was a "footnote" to the parties' settlement agreement, was "never part of . . . the Defendants' mental processes," and that the "Defendant's [sic] utter lack of interest . . . [in the topic] was manifest" does not merely strain credulity, it offends it. (*Amended Brief in Support of Plaintiff's Motion to Enforce Settlement*, at 7; *Brief in Support of Plaintiff's Motion to Enforce Settlement*, at 7, 11). Even a cursory reading of the emails makes luminously clear the importance defendants attached to the release of the childrens' claims. As late as May 23, 2005, Mr. Caruso made reference to the defendants' "requirement of protection from any action by a child when they reach maturity." (*Defendants' Br.*, Ex. D24).

Equally feckless is the argument that the defendants are adequately protected because the statute of limitations has run. Predictably, the argument is supported only by the *ipse dixit* of Ms. Seymour's lawyers. Hence, the argument is waived. *Perry v. Sullivan*, 207 F.3d 379, 383 (7th Cir. 2000); *United States v. Cusimano,* 148 F.3d 824, 828 n. 2 (7th Cir. 1998). More importantly, the defendants bargained for certainty, not for Ms. Seymour's lawyer's prognostications or the opportunity to litigate what is at least now an open question, and a court's role "is not to redistribute ... risks and opportunities as [it sees] fit....' " 11 Williston, Contracts §31.5 at 298 (4th Ed. 1999).

The Fair Housing Act requires that an aggrieved person file a complaint with the Department of Housing and Urban Development within one year and commence an action in federal court no later than two years after the last occurrence of alleged discriminatory conduct. 42 U.S.C. §3610(a)(1)(A)(i); 42 U.S.C. §3613(a)(1)(A). Time requirements in lawsuits between private litigants are customarily subject to equitable tolling. Indeed, the Supreme Court has made clear that the statutory time limits applicable to law-

suits against private employers under Title VII are subject to equitable tolling. *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 95 (1990). Whether that can include infancy, the Supreme Court has not yet said. While there are isolated decisions, they are meaningless until the Supreme Court has spoken. Even decades of uniform circuit precedent on a given issue does not ensure that the Supreme Court will agree when it finally hears the issue. *See, e.g., McNally v. United States*, 483 U.S. 350 (1987).

Finally, there is the argument that the defendants are protected from future litigation since under New York law the release of the minors' claims need not be supported by consideration. A number of objections to this contention come readily to mind. First, the cases cited by the plaintiff did not discuss the issue of consideration to support a settlement, **[20]** and New York courts generally find the adequacy of consideration to support a settlement to be a material issue. *See, e.g., F & K Supply Inc. v. Willowbrook Development Co.*, 288 A.D.2d 713, 732 N.Y.S.2d 734, 737 (3d Dept. 2001); *Della Rocco v. City of Schenectady*, 278 A.D.2d 628, 717 N.Y.S.2d 704, 706 n. 2 (N.Y.A.D. 3d Dept. 2000).

Second, no decision in this case can bind Ms. Seymour's children as they are not parties. Thus, even if I were to agree with the plaintiff's "no consideration needed" argument, the children would be free to litigate any claims they might have

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FN20. *Tudorov v. Collazo*, 215 A.D.2d 750, 627 N.Y.S.2d 419 (2d Dept. 1995) held that a guardian *ad litem* was not authorized to apply for approval of a settlement of a party's claim, while *Candiloro v. City of New York*, 26 A.D.2d 693, 272 N.Y.S.2d 679 (2d Dept. 1966) simply stated that the entry of a judgment on consent, in the absence of an order of compromise and without the protective procedures prescribed by the CPLR for the settlement of infant's actions complied with by the parties, was in error.

against the defendants. Third, and most importantly, the no-consideration needed argument puts out of view what occurred before Judge Seibert and the plaintiff's non-compliance with New York law discussed earlier. Whether Judge Seibert would or could have approved the releases without some allocation had he been "fully advised in the premises" is anyone's guess. Obviously, the plaintiff and her lawyers did not think so, or they would not have concealed Ms. Seymour's March 30th email, would not have changed the word "the" to "any," would not have deleted the phrase in Paragraph c. that they did, would not have falsely characterized it as a minor non-substantive change, and would not have made the misleading and underinclusive presentation to Judge Seibert that they did. Thus, to argue that under New York law a release need not be supported by consideration, is to argue an analytical irrelevancy.

The purpose of any settlement agreement is to eliminate the uncertainties inherent in litigation. *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 215 (1994); *Carson v. American Brands, Inc.*, 450 U.S. 79, 87 (1981). To that end, the defendants insisted on a valid release of the childrens' claims by the Surrogate's Court. The defendants did not bargain for an empty form - for a release, regardless of how it was obtained. Plaintiff cannot substitute for the promised valid releases her lawyer's partisan prophesies of how a court would rule in the event the defendants were to become embroiled in litigation with the children on the question of the statute of limitations or the enforceability of the releases she obtained under the most questionable of circumstances. [**21**]

FN21. The question is not, as the plaintiff has posed it, whether the defendants might win if a suit is brought by the children at some indeterminate time in the future. The defendants bargained for a valid release of whatever claims the Seymour children had in order to ensure that there would be no further litigation "when they reach maturity." (*Defendants Br.*, Ex. D24). They did not bargain for the chance to win the case.

E. Defendants are Entitled to Specific Performance of the Settlement Agreement

Settlement agreements may be enforced by specific performance. *Kokkonen*, 511 U.S. at 378; *Industrial Associates, Inc. v. Goff Corp.*, 787 F.2d 268, 269 (7th Cir. 1986); *Blue Cross and Blue Shield Assn. v. American Express*, 2005 WL 1838340, 2005 U.S. Dist. LEXIS 15158 (N.D.Ill. July 25, 2005); *Cummings v. Beaton & Associates, Inc.*, 249 Ill.App.3d 287, 324, 618 N.E.2d 292, 314 (1992). Specific performance is an equitable remedy, which rests within the sound discretion of the trial court based on all facts and circumstances. *Daniels v. Anderson*, 162 Ill.2d 47, 56, 642 N.E.2d 128 (1994); *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 984 F.2d 223, 227 (7th Cir. 1993). Specific performance refers to the performance of the very thing the contract calls for. *Rothner v. Mermelstein*, 219 Ill.App.3d 502, 507, 579 N.E.2d 1022, 1026 (1st Dist. 1999).

Specific performance is available where: (1) there is a valid, binding, and enforceable contract; (2) the party seeking specific performance has complied with the terms of the contract or is ready, willing, and able to; and (3) the opposing party failed or refused to perform his part of the contract, and there is an inadequate remedy at law. *Blue Cross and Blue Shield Assn., supra.* [**22**] Relief can be denied where the change of circumstances would result in a peculiar hardship or would produce an inequitable result. *Gordon v. Bauer*, 177 Ill.App.3d 1073, 1083, 532 N.E.2d 855, 861 (1988). In the instant case, all the prerequisites for specific performance exist.

FN22. Damages need not be wholly inadequate for an injury to be irreparable. *Roland Machinery Co. v. Dresser*, 749 F.2d 380 (7th Cir. 1984).

Thus, Ms. Seymour is hereby ordered not later than December 9, 2005 to: (1) make an appropriate re-application to Judge Seibert in the Surrogate's Court in New York; (2) submit petitions that set forth accurately the allegations that were made in the complaint and the amended complaints regarding her children and the facts and circumstances of her Fair Housing Act claim as set forth in those pleadings and in her deposition; (3) make a reasonable allocation of a sum of money from the $40,000 payment to be applied to her children's claims; and (4) comply in all respects with applicable New York law in making application to Judge Seibert. Under New York law, it shall be up to him to determine whether the amount of the allocation selected by Ms. Seymour is adequate.

Ordering Ms. Seymour to provide defendants with file stamped copies of all materials to be filed with the New York Court and provide them with seven days notice of hearings in the New York Court is improper as a matter of specific performance since these were not terms of the parties' settlement agreement. However, that does not mean that a court does not have authority to require Ms. Seymour to comply with these requirements, not as a matter of specific performance, but to ensure that there can be appropriate monitoring of her performance. Thus, Ms. Seymour shall comply with these latter two requirements.

III. THE DEFENDANT'S REQUEST FOR ATTORNEYS' FEES

The defendants have requested an award of attorneys' fees. However, they have cited no case to support the request; they have neither identified those against whom they are seeking fees, nor the basis on which a fee award should be bottomed. Is the request for fees against the plaintiff's lawyers, the plaintiff, or both. If it is against the lawyers, are

all equally culpable and are all to bear equally the burden of any award? These and other questions must be answered before an appropriate fee award can be entered. It is not for a court to make the arguments for a party and to provide the legal analysis. *Cf. United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991).

The defendants shall have until November 15, 2005 to file a supplemental memorandum not to exceed ten pages in support of their request for attorneys' fees. The plaintiff shall have until November 22, 2005 to respond. Her response may not exceed ten pages. Unless the court orders otherwise, there shall be no reply by the defendants.

CONCLUSION

For the foregoing reasons, the defendants' motion to enforce settlement and for attorneys fees [#43] is GRANTED in part and DENIED in part without prejudice, and the plaintiff's motion to enforce settlement [#41] is DENIED.

/ S / Magistrate Judge Jeffrey Cole

[***Petitioner's Note:*** Also officially-reported with the November 8, 2005 Ruling at 413 Supp. 2d 910 (and at 2005 WL 30506235) is Magistrate Judge Cole's Memorandum Opinion on Plaintiff's Motion for Reconsideration, reproduced separately herein to provide the issued Orders' text *verbatim.* However, Petitioner retained the official reporter's alternate footnote numbering within the November 9, 2005; please see below.]

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

Donna L. SEYMOUR, Plaintiff,
v.
CAROL HUG and ROGER HUG, d/b/a REMAX TEAM 2000; PATRICIA BROWN-WYRICK; CENDANT MOBILITY CORP., a Corporation; and CURTIS CASTLE and CAROL CASTLE, Defendants.

Case No. 04 C 2041

Magistrate Judge Jeffrey Cole

MEMORANDUM OPINION ON PLAINTIFF'S MOTION FOR RECONSIDERATION

On November 9, 2005, following the issuance of the November 8th opinion denying the plaintiff's motion to enforce the settlement agreement and the granting of the defendants' cross-motion to enforce the settlement agreement, the plaintiff's counsel announced at the previously scheduled status hearing that she would be filing a motion for reconsideration. During the initial colloquy, Ms. Matlaw insisted that there had been no intent to deceive either the defendants' counsel or the Surrogate's Court. She could not, however, provide a persuasive reason why she or her colleagues did not inform the defendants' counsel of Ms. Seymour's March 30th refusal to make the allocation of some amount of settlement to her children, as the defendants' had insisted continuously from the beginning of negotiations. The best she could do was to say that given her client's irrationality and temperament, she could not be sure the March 30th position would remain con-

stant. She could not explain, however, why at no time in the intervening 29 days she did not tell defense counsel about Ms. Seymour's *volte face*. Her version was that on April 28th the defendants unilaterally decided to drop the allocation requirement, although she could not give any reason why that would have occurred.

Ms. Matlaw claimed that Judge Seibert of the Surrogate's Court had not been deceived in any way since Ms. Seymour's children had no claims and had really not suffered damages except in the relationship with their mother, and because the statute of limitations had run in any event. She could give no persuasive reason why the complaint and amended complaints she and her colleagues drafted said something very different or why the statute of limitations argument had never been raised or even discussed with defense counsel-let alone why these explanations were not made to Judge Seibert in support of the petitions' contention that the children had no claims **fn 1 [23].**

Ms. Matlaw said that the conclusions drawn on the November 8th opinion were based on a core factual mistake, namely that Mr. Howard and not the plaintiff's lawyers had made the change in paragraph c. (which became paragraph b.), which deleted the phrase, "and directing the amounts to be paid to the minors' estates." The defendants' brief had categorically said that "[t]his change was made by plaintiff; it was not 'excised' by defendants." (*Defendants' Joint Reply In*

FN1. Initially, she tried to say that a student had drafted the petitions, but did not deny that they had been reviewed by her and her colleagues. Indeed, she said they had been reviewed very carefully to be sure there was no violation of the agreement's confidentiality provision. Ms. Matlaw was unable to explain the petitions' allegations that Devin and Peter Madkin were not mentioned in the federal complaint and other similar allegations, which were false, as explained in the November 8th Memorandum Opinion and Order.

Opposition To Plaintiff's Motion To Enforce Settlement And In Support of Defendants' Cross-Motion To Enforce Settlement at 5) (Emphasis in original). I gave Ms. Matlaw leave to file her motion for reconsideration, which dealt solely with this claimed factual error and asked the parties to appear at 2:00 to further discuss the matter. I ordered that Mr. Howard appear and explained that I was deeply concerned over Ms. Matlaw's continued charges that he was responsible for the critical change in the settlement agreement.

For a variety of psychological and institutional reasons, there is a natural tendency to view motions for reconsideration with a measure of skepticism. But, even though they are generally disfavored, *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990), motions for reconsideration can serve a valuable function by helping, under appropriate circumstances, to ensure judicial accuracy, which, in the last analysis, is the desideratum of the whole process. Judged are not omniscient; and even the most gifted judges can make mistakes. *Tome v. United States*, 513 U.S. 150, 167 (1995) (Scalia, J., concurring in part and concurring in the judgment). Indeed, the Seventh Circuit has cautioned that "in any given opinion, [a court] can misapprehend the facts ... or even overlook important facts or controlling law." *Olympia Equipment v. Western Union*, 802 F.2d 217, 219 (7th Cir. 1986). **fn 2 [24]**

A careful review of Ms. Matlaw's motion demonstrates its fundamental error and her refusal to come to grips with the indisputable facts of the case. The motion's thesis is that on April 28th, Mr. Howard sent a version of the settlement agreement that did not contain any reference to an allocation and

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FN2. *See also Willy v. Coastal Corp.*, 503 U.S. 131, 139 (1992). *LaSalle v. Medco Research, Inc.*, 54 F.3d 443, 444 (7th Cir. 1995); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452 (7th Cir. 1990).

which deleted the phrase "and directing the amounts to be paid to the minors' estates." The question, however, is not what the April 28th version said, but whether on April 1st the plaintiff's lawyers had deleted the phrase "and directing the amounts to be paid to the minors' estates," after receiving Ms. Seymour's March 30th ultimatum.

The November 9th Memorandum Opinion spelled all this out in great detail. The motion for reconsideration chooses to ignore that discussion and to continue to advance a thesis that the undisputable evidence demonstrates is unsustainable. Far from disproving that the plaintiff's lawyers altered Paragraph c., the motion for reconsideration confirms that fact. Exhibit 1 to the motion for allocation of some portion of the $40,000 to the children. Exhibit 2 is a March 29th email for Mr. Howard to Mr. Caruso and Ms. Matlaw containing the phrase "and directing the amounts to be paid to the minors' estates." Exhibit 3 is Mr. Howard's April 28th draft which admittedly does not contain the above phrase. Carefully ignored is the April 1st email from the Plaintiff's lawyers to Mr. Howard attaching the plaintiff's revisions, which deleted the phrase, "and directing the amounts to be paid to the minors' estates," and characterizing this and other changes as minor and non-substantive. All the April 28th version did was to incorporate the deletion the plaintiff's lawyers had made. In sum, the undisputable facts of the case reveal that two days after Ms. Seymour decided she would not make any allocation to her children-even though she had agreed two weeks earlier to do so-the plaintiff's lawyers excised the critical phrase in Paragraph c. and assured Mr. Howard that the change really meant nothing at all. "The mind of justice, not merely its eyes, would have to be blind to attribute such an occurrence to mere fortuity." *Avery v. Georgia*, 345 U.S. 559, 564 (1953) (Frankfurter, J., concurring).

The hearing on the motion was reconvened at 1:45 p.m.

Mr. Howard appeared as did Ms. Matlaw and Ms. Cribaro-Mello. **fn 3 [25]** Ms. Matlaw said that she had made a mistake in the motion to reconsider, that the plaintiff's lawyers had indeed made the change on April 1st and that she had only just learned of her error. Nonetheless, she continued to insist that the defendants were responsible for what occurred by saying nothing about the change and incorporating it into the April 28th version, which she said effectively did away with the allocation provision. Not surprisingly, she offered no explanation as to why the defendants would have dropped a condition upon which they insisted from the beginning and to which Ms. Seymour had agreed on March 14th. At bottom, Ms. Matlaw's argument is nothing more than "shame on you for taking me at my word, when I said that the change was minor and not at all substantive." But that sort of approach has little to commend it either as a matter of law or candor. *Cf. Ash v. Georgia-Pacific Corp.*, 957 F.2d 432, 436 (7th Cir. 1992)(" '[A] liar may not lull the victim into a false sense of security and then say that the reliance was not justifiable.' "). **fn 4 [26]**

She also continued to insist that notwithstanding her concession of error, the opinion of November 8th was still wrong insofar as it suggested any misconduct by the plaintiff's lawyers. Her explanations, at least to me, defied understanding. Part of her justification was that they had conceded on many points that Mr. Howard had insisted on, although I am at a loss to understand how that excuses what was done to the defendants and to Judge Seibert. What was clear, however,

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FN3. Mr. Caruso had a preexisting commitment and I had excused his appearance.

FN4. There was an apparent suggestion the plaintiff's lawyers considered this a minor, non-substantive change. That is at odds with the evidence in the case and with common sense.

was that nor a single one of the justifications now offered in defense of the post-March 30th conduct was advanced to the defendants at the time they complained about what had occurred in New York. *Compare Ty, Inc. v. Publications International Ltd.*, 2003 WL 21294667 (N.D.Ill. 2003) (Zagel, J.) ("[P]erhaps the most telling evidence that discovery included damages is the fact that when Ty moved for summary judgment on the issues of damages, PIL never objected on the ground that it needed additional discovery."). By contrast, the defendants complained immediately, bitterly, and consistently with what they now contend when they learned about the presentation to Judge Seibert.

In response to my questions, Mr. Howard said that from April 1st on he dealt almost exclusively with Mr. Caruso. Ms. Matlaw, in response to my question, said that she had communicated the content of Ms. Seymour's March 30th email to Mr. Caruso, and it was conceded by all that no one on the plaintiff's side had ever told any of the defense counsel of Ms. Seymour's March 30th email to her lawyers. When I asked Ms. Matlaw why she had unilaterally changed the phrase, "the claims of the minor children," to "any claims of the minor children," she said it was to make the releases more protective of Ms. Seymour and to release any claims the children might have had against her for failure to have filed a separate lawsuit on their behalf at an earlier time.

This answer is singularly unpersuasive-and in a sense, somewhat disturbing. The sole purpose of the petitions to Judge Seibert was to obtain his approval of the proposed settlement with the defendants in the instant case and a release of the children's claims against them, of whatever nature. It was most assuredly not to obtain a release against Ms. Seymour or the world at large. Thus, the phrase, "any claims," must be understood in the context of the petitions' specific and narrow purpose, for "[t]he principle determinant of

meaning is context ...." Scalia, A Matter Of Interpretation: Federal Courts And The Law, 1, 35 (1997). "When context is disregarded, silliness results." *In re Handy Andy Home Improvement Centers*, 144 F.3d 1125 (7th Cir. 1998) (Posner, J.). **fn 5 [27]** In short, it simply cannot be said that the issue of Ms. Seymour's possible nonfeasance was truly intended by Ms. Matlaw to be encompassed within the scope of the release the petitions asked Judge Seibert to approve. If Ms. Matlaw's current explanation is genuine, it would certainly appear that the change in the phrasing was designed not to "fully apprise" the Surrogate's Court, but to smuggle into the release a claim which Judge Seibert could not have imagined was being released.

For the reasons above, the motion to reconsider is denied. The defendants, having indicated that they wish to pursue the matter of fees, their consolidated brief will be due in accordance with the schedule in the November 8th Memorandum Opinion and Order.

ENTERED: [*S*] Jeffrey Cole
UNITED STATES MAGISTRATE JUDGE

DATE: November 9, 2005

FN5. *Compare King v. St. Vincent's Hospital*, 502 U.S. 215 (1991); *Textron Lycoming Reciprocating Engine Division v. United Automobile, Aerospace & Agricultural Implement Workers*, 523 U.S. 653 (1998).

[End of Appendix]